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## Malignant Indifference: The Wages of Contemporary Child Labor in the United States

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## MALIGNANT INDIFFERENCE: THE WAGES OF CONTEMPORARY CHILD LABOR IN THE UNITED STATES

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### *I. Introduction*

*A self-supporting and self-respecting democracy can plead no justification for the existence of child labor . . . .*<sup>1</sup>

The problems associated with child labor<sup>2</sup> in underdeveloped countries have captured our nation's attention. Legislatures have passed statutes and resolutions,<sup>3</sup> citizen coalitions have organized,<sup>4</sup> and the media has devoted

1. Message of President Franklin Delano Roosevelt to Congress, H.R. DOC. NO. 255, at 2 (May 24, 1937).

2. The term "child labor" is used here to describe paid employment by persons under eighteen years of age. "Youth workers" and other terms are used throughout this article synonymously. "Child labor" is a term rich in historical and political connotations. At some point, of course, a "child" is old enough and experienced enough to act independently and choose to work. Most nations view eighteen as the age when a person officially moves from childhood to adulthood, with attendant legal and political responsibility. *See, e.g.,* Convention on the Rights of the Child (CRC), U.N. GAOR, 45th Sess., 61st plen. mtg., art. 1, UN DOC, A/Res/44/25 (1989) (defining a child as a human being under the age of eighteen). All but two states have ratified the CRC; the United States has signed but not ratified, and Somalia has not signed or ratified. Office of the United Nations High Commissioner on Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004*, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Oct. 28, 2004). The U.S. common law, however, also recognizes legal adulthood as beginning at age eighteen or upon emancipation, such as by marriage or parental consent.

3. President Clinton issued an Executive Order barring federal agencies from purchasing goods produced with forced child labor. Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (June 12, 1999). State legislatures have also addressed the issue.

4. *See, e.g.,* Evelyn Iritani, *Group Calls for Ban on Myanmar Imports; Leading Organization of U.S. Apparel and Footwear Makers Joins Campaign Protesting Human Rights Abuses*, L.A. TIMES, Apr. 16, 2003, at C4 (noting that "under pressure from citizens groups, retailers have become more vigilant about policing their overseas factories"); *see also*

extensive coverage to the issue.<sup>5</sup> School classes have petitioned Disney and Nike to stop employing child workers in their overseas factories.<sup>6</sup> Global Exchange protestors recently rallied in front of M&M's World store in Las Vegas to protest Mars's use of cocoa harvested with child labor.<sup>7</sup> Even portfolio managers are under investor pressure not to invest in foreign companies using child labor.<sup>8</sup> Only one thing is missing from this wave of moral outrage and activism — attention to the problems of child labor here at home.

In 2001, more than 3.7 million American youths worked.<sup>9</sup> Employment in the United States poses substantial, immediate, and long-term risks for youthful workers. Many are killed and injured each year.<sup>10</sup> The total number

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Addressing Child Labour, at <http://www.workingchild.org> (last modified June 10, 2004); Campaign for Labor Rights, at <http://www.campaignforlaborrights.org> (last visited Aug. 28, 2004); Child Labor and the Global Village, at <http://www.childlaborphotoproject.org> (last visited Aug. 28, 2004); Child Labor Coalition, at <http://www.stopchildlabor.org> (last visited Aug. 28, 2004); Child Labor in Agriculture, at <http://fieldsofhope.org> (last visited Aug. 28, 2004); International Labor Rights Fund, at <http://www.laborrights.org> (last modified Nov. 23, 2004); Labors of Love Project, at <http://www.childlabor.org/frames.html> (last visited Aug. 28, 2004); National Consumers League, at <http://www.natlconsumersleague.org> (last visited Nov. 28, 2004); Rugmark Foundation, at <http://www.rugmark.org> (last modified Sept. 27, 2004); Unite Here, at <http://www.unitehere.org> (last visited Aug. 28, 2004).

5. See, e.g., *Child Labor Controversy Woven Into the Rug Business*, WASH. POST, Mar. 14, 2002, at H6; Nicholas Kulish, *White House Plans a Parting Effort Aimed at Child-Labor Abuses World-Wide*, WALL ST. J., Jan. 16, 2001, at A28.

6. *The Invisible Children*, N.Y. TIMES, Feb. 20, 2000, § 4, at 12; see also Doug Grow, *City Kids Unite, Fight Sweatshops; Minneapolis School Board Takes Their Message Seriously*, STAR TRIB., Nov. 26, 2002, at 2B ("[T]he question of what can be done about labor abuses ended up as a project of the Minneapolis district-wide student government. That body, made up of 10 students from each of the city's high schools, started drawing up resolutions to alter the district's purchasing policies.").

7. Alana Roberts, *M&M's World Targeted Over African Cocoa-Farming Issue*, LAS VEGAS SUN, Feb. 6, 2004, at C1.

8. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1296-97 (1999).

9. U.S. GAO, *CHILD LABOR: LABOR CAN STRENGTHEN ITS EFFORTS TO PROTECT CHILDREN WHO WORK* 10 (Sept. 2002) [hereinafter GAO REPORT].

10. The National Institute for Occupational Safety and Health (NIOSH) reports that an average of sixty-seven minors die each year from work-related injuries. NIOSH, *RECOMMENDATIONS TO THE U.S. DEPARTMENT OF LABOR FOR CHANGES TO HAZARDOUS ORDERS* xi (May 3, 2002), at <http://www.stopchildlabor.org/USchildlabor/niosshosummary.htm> [hereinafter NIOSH REPORT].

of occupational fatalities from 1992-1998 for youths under eighteen was 468.<sup>11</sup> An estimated 200,000 young people are injured on the job annually.<sup>12</sup>

In addition to health risks, youth employment fails to teach children the skills they need to become responsible adults. Instead of using their wages to support their families, teens typically spend their wages on luxury items.<sup>13</sup> Contemporary American teens are avid consumers, spending \$170 billion in 2002.<sup>14</sup> Moreover, today's workplace encourages

[y]oung people [to] perform tasks and use skills . . . that few will perform or use again in work settings after they cease to be adolescents. . . . [These jobs provide] little meaningful contact with adults who have a stake in their socialization for the future. . . . [E]conomic rewards . . . typically are used for . . . records, movies, designer clothing, fast food, alcohol, drugs — and not for long-term “adult” investments, such as college, or for increasing the adolescent's ability to establish an independent household.<sup>15</sup>

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11. The age breakdowns for occupational fatalities are as follows: under fifteen years old, 134; fifteen years old, 54; sixteen years old, 100; seventeen years old, 180. U.S. DEP'T OF LABOR (DOL), REPORT OF YOUTH LABOR FORCE: OCCUPATIONAL INJURIES, ILLNESSES AND FATALITIES 60 (2000), at <http://www.bls.gov/opub/rylf/pdf/chapter6.pdf> [hereinafter REPORT OF YOUTH LABOR FORCE].

12. GAO REPORT, *supra* note 9, at 1. Hospital emergency departments treated an estimated 77,000 children for nonfatal injuries. NIOSH REPORT, *supra* note 10, at xi.

13. See, e.g., Beth Cox, *Teens' Money is Online Gold*, Sept. 7, 2001, at [http://ecommerce.internet.com/news/news/article/0,3371,10375\\_880241,00.html](http://ecommerce.internet.com/news/news/article/0,3371,10375_880241,00.html) (reporting that nearly one-third of all teens carry cell phones, and most eat out with friends at least once every week); Cindy Rodriguez, *Deep Pockets are In: Teens Spend \$104 a Week on Food, Goods, Survey Says*, BOSTON GLOBE, Feb. 18, 2003, at B1.

14. This is a \$15 billion increase from 2000. Teen consumers purchase a wide variety of clothing, food, electronics, and other goods. Tony Rizzo, *What's Been Learned About How to Market to Teens (And Why)*, CREDIT UNION J., Aug. 11, 2003, at 4; Teenage Research Unlimited (TRU), *Teens Spent \$170 Billion in 2002*, Feb. 17, 2003, at [http://www.teenresearch.com/Prview.cfm?edit\\_id=152](http://www.teenresearch.com/Prview.cfm?edit_id=152). TRU surveys demographically representative American teens “on trends, lifestyles, attitudes, and consumer behaviors” twice each year. *Id.* The “spending total[s] combine[] teens' own discretionary spending and any spending they do on their parents' behalf, whether for personal or household purchases.” *Id.* Most teenage spending, however, is personal, and not for the family's benefit. See Cox, *supra* note 13 (noting that teens spent \$483 million online in 2000); Maxwell Murphy, *Monday's Investors Get Their Shares Off the Rack; Clothing: Apparel Retailers, Expected to Report Good Earnings, Seem to Be the Market's Flavor of the Day*, L.A. TIMES, Feb. 27, 2001, at C3 (“Teenage boys spend about 52% of their money on clothes, teenage girls about 75%.”); Rodriguez, *supra* note 13; TRU, *Teens Spend \$155 Billion in 2000*, Jan. 25, 2001, at [http://www.teenresearch.com/Prview.cfm?edit\\_id=75](http://www.teenresearch.com/Prview.cfm?edit_id=75).

15. ELLEN GREENBERGER & LAURENCE STEINBERG, WHEN TEENAGERS WORK: THE PSYCHOLOGICAL AND SOCIAL COSTS OF ADOLESCENT EMPLOYMENT 88-89 (1986).

This premature affluence has its own risks.

A child's employment status also negatively affects school work and social behavior, particularly when a child works excessive hours.<sup>16</sup> Scholars define "high-intensity work" as twenty or more hours per week.<sup>17</sup> Generally, high school students engaged in high-intensity work have lower grade point averages than students who do not work at all or who work fewer hours.<sup>18</sup> In addition to lower grades, these student-workers are more likely to be suspended from school,<sup>19</sup> use cigarettes and other substances,<sup>20</sup> and experience a wide variety of other negative outcomes. Subgroups of youth workers, such as agricultural workers or teens in lower social and economic groups, are at even greater health and educational risks.<sup>21</sup>

Contemporary U.S. child labor law and enforcement reflects a malignant indifference to the plight of American youth in the workplace. American law generally does not permit minors to make decisions with long-term consequences on their own.<sup>22</sup> Yet the federal Fair Labor Standards Act (FLSA)<sup>23</sup> requires no consent from — or even notification to — parents before a child may work. While some minimal hour limits are set for youths under sixteen in nonagricultural employment,<sup>24</sup> only jobs or equipment designated "hazardous" by the Department of Labor (DOL) are off limits for children sixteen or older.<sup>25</sup> Remarkably, those hazardous designations have remained

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16. Donna S. Rothstein, *Youth Employment During School: Results from Two Longitudinal Surveys*, MONTHLY LAB. REV., Aug. 2001, at 25-26; see also U.S. DOL, REPORT ON THE YOUTH LABOR FORCE: THE RELATIONSHIP OF YOUTH EMPLOYMENT TO FUTURE EDUCATIONAL ATTAINMENT AND LABOR MARKET EXPERIENCE ch. 7 (2000), at <http://www.bls.gov/opub/rylf/rylf/pdf/chapter7.pdf>.

17. NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, PROTECTING YOUTH AT WORK 3-4 (1998) [hereinafter PROTECTING YOUTH AT WORK]. Some scholars have noted benefits of employment when youth work a moderate number of hours. See, e.g., Christopher J. Ruhm, *Is High School Employment Consumption or Investment?*, 15 J. LAB. & ECON. 735, 738 (1997).

18. See generally Mark Schoenhals et al., *The Educational and Personal Consequences of Adolescent Employment*, 77 SOC. FORCES 723 (1998).

19. Rothstein, *supra* note 16, at 28-29.

20. *Id.*

21. Rod Kodman & Janna Trevisanut, *Migrant Children Under Child Welfare Service Jurisdiction: Who Will Guard the Guards Themselves?*, 12 SAN JOAQUIN AGRIC. L. REV. 1, 4 (2002).

22. See *infra* Part IV.B.

23. 29 U.S.C. §§ 201-219 (2000).

24. Fourteen- to sixteen-year-olds may not work more than eighteen hours per week during the school year, nor after 7:00 p.m. on a school night. 29 C.F.R. § 570.35(a) (2003).

25. 29 U.S.C. § 203(l).

largely unchanged for decades.<sup>26</sup> The DOL, moreover, has imposed no other hour or place restrictions on the work of sixteen- and seventeen-year-olds.<sup>27</sup>

The FLSA also has huge gaps in coverage, and private enforcement of the statute — typical of other civil rights and protective legislation — is unavailable.<sup>28</sup> Despite DOL's monopoly on enforcement, its performance is extraordinarily ineffectual.<sup>29</sup> In the last decade, the federal courts decided only six lawsuits involving child labor violations.<sup>30</sup> The DOL underestimates the numbers of illegally employed children and rarely initiates investigations of statutory violations.<sup>31</sup>

States also regulate child labor, although most states follow the pattern of the federal FLSA.<sup>32</sup> State child labor laws are also closely connected to compulsory school attendance laws, which determine the minimum permissible age for leaving school. While many states give parents the right to notice and consent concerning a child's decision to drop out of school, other states leave the decision to the child once they attain a minimum age.<sup>33</sup> The decision to work, however, is almost always left to the child.

Any attempt to explain the current inadequacies must begin with an analysis of the past. Historically, restriction of child labor was one front in a

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26. PROTECTING YOUTH AT WORK, *supra* note 17, at 168.

27. NIOSH has made recommendations for changes to these hazardous occupation orders. See NIOSH REPORT, *supra* note 10, at xi-xii.

28. See *infra* notes 295-99, 303-16, 341-42 and accompanying text.

29. See *infra* Part V.A.1.c.

30. See *Parris v. Herman*, No. 99-5338, 2000 WL 571932 (6th Cir. May 3, 2000) (reviewing DOL decision and deciding in favor of DOL by granting its summary judgment motion and enforcing civil money penalties); *Herman v. Zamora*, No. 98-15501, 1999 WL 311207 (9th Cir. May 12, 1999) (deciding that no criminal penalties should be assessed with regard to attorney fees and adding defendants); *Acura of Bellevue v. Reich*, 90 F.3d 1403 (9th Cir. 1996) (holding that action against DOL for monetary penalties assessed against car dealers is not ripe for review); *Chao v. Vidtape*, 196 F. Supp. 2d 281 (E.D.N.Y. 2002) (awarding liquidated damages, injunction, and back pay for violation of minimum wage laws, hot goods laws, and child labor laws), *modified*, Nos. 02-6090, 02-6129, 2003 WL 21243085 (2d Cir. May 29, 2003) (awarding liquidated damages and back pay and eliminating subsidiaries from action), *mot. granted*, No. CV-98-3359, 2004 WL 203008 (E.D.N.Y. Jan. 30, 2004) (allowing installment payments of civil penalties assessed); *Thirsty's, Inc. v. U.S. Dep't of Labor*, 57 F. Supp. 2d 431 (S.D. Tex. 1999) (holding that DOL's calculation of monetary penalties was acceptable); *Reich v. Shilo True Light Church of Christ*, 895 F. Supp. 799 (W.D.N.C. 1995) (holding that children receiving vocational training under church were employees under the auspices of the FLSA, and therefore had to be paid for labor), *aff'd*, No. 95-2765, 1996 WL 228802 (4th Cir. May 7, 1996).

31. See GAO REPORT, *supra* note 9, at 37.

32. The FLSA expressly allows for greater protection of child workers by state law. 29 C.F.R. § 570.50(a) (2003); see *infra* notes 179-82 and accompanying text.

33. See *infra* Part V.A.2.c.

long legal war waged to determine the constitutional boundaries between state and federal power.<sup>34</sup> In many instances, and sometimes out of necessity, parents wanted children as immediate income providers,<sup>35</sup> while employers desired this source of cheap and controllable labor.<sup>36</sup> The enactment of state, and later federal, child labor laws was slow and bitterly contested.<sup>37</sup> The original state statutes created modest restrictions on both parental ability to force young children to work and the right of employers to contract with children. Enactment of the child labor provisions of the federal FLSA<sup>38</sup> in 1938 was a moral and political victory, but its practical effect was limited, as many of the FLSA's protections were eviscerated during World War II.<sup>39</sup>

In an attempt to rally public support for legislative reforms, the National Child Labor Committee, in the early 1900s, used dramatic visual images to document the horrors and negative social effects of unrestricted child labor.<sup>40</sup> Louis Hine, a photographer and social reformer who worked for the Committee, photographed children in textile mills, the tobacco industry, and a variety of other settings.<sup>41</sup> These images were immensely important in changing public opinion. Today, modern equivalents to Hine's photos are desperately needed to focus America's attention on contemporary child labor.

Despite the extraordinary economic and social changes in the United States, the FLSA remains largely unchanged since the 1960s.<sup>42</sup> Over the years, powerful interests have resisted change. The Act contains numerous exemptions and significant structural defects; moreover, enforcement is lax.<sup>43</sup> State child labor laws and administration reflect similar problems. Because children are politically voiceless, there is no powerful constituency demanding change. This political powerlessness leaves America's youth largely forsaken.

This Article contains six parts. Part II describes the long struggle to protect children from the most shocking forms of exploitation in the late nineteenth and early twentieth centuries. Next, Part III sets out the legal structure of the contemporary regulation of child labor. Part IV examines the negative

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34. See *infra* notes 103-04 and accompanying text.

35. See *infra* notes 49-52, 67-68 and accompanying text.

36. HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 33 (2002).

37. See *infra* Part II.B-E.

38. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201 (2000)).

39. See Natsuki Aruga, "An' Finish School": *Child Labor During World War II*, 29 LAB. HIST. 498, 518-20 (1988).

40. ALEC FYFE, *CHILD LABOR* 59-61 (1989).

41. See generally LOUIS HINE, *PHOTOGRAPHS OF CHILD LABOR IN THE NEW SOUTH* (John R. Kemp ed., 1986).

42. PROTECTING YOUTH AT WORK, *supra* note 17, at 77.

43. See *infra* Part V.A.



consequences of the large number of minors engaged in high-intensity employment for American youth and society at large. Finally, Part V makes the case for changing the existing situation, highlighting the weaknesses of contemporary American child labor law and describing proposals for improvement.

## *II. How We Got Here: The History of Child Labor Regulation*

### *A. A History of Child Labor*

Child labor has a lengthy history in the United States. Children owed services to their parents, and parents could assign their children's service to others.<sup>44</sup> In colonial times, children were indentured for long periods.<sup>45</sup> Master craftsmen contracted with parents to train the child in a trade or craft in exchange for years of the child's services.<sup>46</sup> "Bound out" orphans were taken in by strangers with the expectation that the child would provide useful labor.<sup>47</sup>

Between 1860 and 1890, over ten million immigrants arrived in the United States.<sup>48</sup> Often these families faced poverty and chronic underemployment; the wages from child labor were necessary to support the family.<sup>49</sup> A study in Philadelphia in 1880, for example, revealed that children of Irish-born men earned between 38% and 46% of their household's total income; in families with German-born fathers, children earned between 33% and 35%.<sup>50</sup> Parents

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44. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 259 (G. Edward White ed., 1985). See generally JOSEPH HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* (1991).

45. Steven B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 461 (1972).

46. See generally MARILYN IRVIN HOLD, *THE ORPHAN TRAINS* (1992).

47. "Bound out" refers to orphans without relatives that were placed in homes, usually for the economic well-being of the master more than the orphan. Presser, *supra* note 45, at 558-59.

48. U.S. CITIZENSHIP & IMMIGRATION SERVS., 2002 YEARBOOK OF IMMIGRATION STATISTICS tbl. 1, available at <http://uscis.gov/graphics/shared/aboutus/statistics/IMM02yrbk/IMM2002tables.pdf>.

49. See, e.g., John Modell, *Changing Risks, Changing Adaptations: American Families in the Nineteenth and Twentieth Centuries*, in KIN AND COMMUNITIES: FAMILIES IN AMERICA 119, 128 (Allan J. Lichtman & Joan R. Challinor eds., 1979) (describing child labor in working-class families "as an attempt to pool risks in what was experienced as a very uncertain world").

50. Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 325 n.83 (2002); see also Michael R. Haines, *Poverty, Economic Stress, and the Family in the Late-Nineteenth Century American City: Whites in Philadelphia, 1880*, in PHILADELPHIA: WORK, SPACE, FAMILY AND GROUP EXPERIENCE IN THE NINETEENTH CENTURY 240, 265 (Theodore Hershberg ed., 1981).

commonly made their children available for paid employment.<sup>51</sup> These parents often opposed child labor reform because of the “desperate need . . . for additional income.”<sup>52</sup>

Although the immigrant population remained largely concentrated in urban areas, work by children in agrarian areas was also frequently an economic necessity and, indeed, was seen as essential to a child’s upbringing. Americans at that time believed agricultural labor provided training for adulthood and independence.<sup>53</sup> After the Civil War, however, the population overall migrated from rural communities to larger industrial cities.<sup>54</sup>

By 1900, one out of every six children between the ages of ten and sixteen was gainfully employed.<sup>55</sup> Children between ages ten and thirteen comprised one-third of the workforce in southern textile mills.<sup>56</sup> Children in the post-Civil War South were particularly encouraged to work due to the loss of men in battle. From 1900 to 1920, the urban population in the United States grew by 80%, while rural populations correspondingly declined.<sup>57</sup> Industrialization spurred employment of children in mines, mills, factories, canneries, and other manufacturing establishments.<sup>58</sup> The short- and long-term hazards of work in these enterprises were often great. Unhealthy and dangerous working conditions abounded.<sup>59</sup> Children’s labor in nineteenth and twentieth century

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51. Presser, *supra* note 45, at 460.

52. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 69-70 (1985).

53. *Id.* at 66-68; *see also* 41 CONG. REC. 1552 (1907) (statement of Sen. Beveridge) (“This bill does not strike at the employment of children engaged in agriculture. I do not for a moment pretend that working children on the farm is bad for them. I think it is the universal experience that where children are employed within their strength and in the open air there can be no better training.”).

54. STEVEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA* 1-2 (1968).

55. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE & LABOR, *OCCUPATIONS AT THE TWELFTH CENSUS* cxliii (1904). A total of 1,750,178 children were employed, an increase of one million children since 1870. *See* BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* 75-84 (1975). This figure represented 6% of the total labor force. *Id.* (reporting 765,000 child workers out of a total workforce of 12,925,000).

56. Employment of children in Southern states became more common in the late 1800s as the region’s textile industry expanded. By 1900, more children worked in southern mills than in any other sector of industry in the United States, and by 1906, southern mills employed an estimated 60,000 children under the age of fourteen. *See* WOOD, *supra* note 54, at 55. These figures did not include the many children under the age of ten who were known to be at work. *Id.*

57. *Id.* at 1-2.

58. HINDMAN, *supra* note 36, at 33 (noting that women and children comprised the majority of the early industrial workforce in the United States).

59. *See, e.g.,* EDWIN MARKHAM ET AL., *CHILDREN IN BONDAGE* 63-64 (Arno Press, Inc.

America was parental property,<sup>60</sup> stemming from the rule that parents are entitled to their children's services.<sup>61</sup> As one state supreme court justice asserted in 1888, "It is a rule as old as the common law that the father is entitled to the custody and control of his minor children, and to receive their earnings."<sup>62</sup> The right of parents to children's services, however, correlated to the parent's obligation to support the child<sup>63</sup> and is statutory today in a number of states.<sup>64</sup>

In the past, the pay envelopes of children workers were customarily given to parents unopened.<sup>65</sup> Payroll records from the mid-nineteenth century reveal that fathers often signed for the children's wages, suggesting that the fathers personally received and retained their children's earnings.<sup>66</sup> Children's wages

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1969) (1914) ("In a Pennsylvania establishment, where the temperature on the outside was 88 degrees, the temperature at the point where the snap-up rubs off the excess glass was 100 degrees; in front of the glory-hole it was 140 degrees. . . . The speed rate of the snapping-up boy is fixed by the output of the shop, and in case of such small wares as one ounce and under he must work with great rapidity. . . . In one factory, . . . the distance from bench to oven was one hundred feet, and the carry-in boys made seventy-two trips in an hour.").

60. Barbara Bennett Woodhouse, *Who Owns the Child?: Myer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1059-68 (1992).

61. HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 314 (2d ed., West 1988); see also *Singer v. Brookman*, 578 N.E.2d 1, 6 (Ill. App. Ct. 1991); *Porter v. Powell*, 44 N.W. 295, 296 (Iowa 1890); *Dembinski's Case*, 120 N.E. 856, 857 (Mass. 1918); *Rohm v. Stroud*, 194 N.W.2d 307, 308 (Mich. 1972); *Am. Prods. Co. v. Villwock*, 109 P.2d 570, 579 (Wash. 1941); *Cook v. Virginian Ry. Co.*, 125 S.E. 106, 109 (W. Va. 1924).

62. *Eustice v. Plymouth Coal Co.*, 13 A. 975, 976 (Pa. 1888). The court upheld the trial court's denial of payment of wages to the mother of a thirteen-year-old worker. *Id.* Under the state law at that time, a mother was entitled to claim the earnings of her children only if the father did not provide for the child, and the mother was of suitable character. *Id.* The company successfully defended against the mother's claim by asserting that the wages had been fully paid and that the plaintiff lacked suitable character. *Id.*

63. *Covey v. Eppes*, 153 So. 2d 3, 4 (Fla. 1963); *Beaudoin v. Beaudoin*, 386 A.2d 1261, 1263 (N.H. 1978). See generally Gary D. Spivey, *Income of Child from Other Source as Excusing Parent's Compliance with Support Provisions of Divorce Decree*, 39 A.L.R. 3d 1292 (1971).

64. See, e.g., CAL. FAM. CODE § 7503 (West 1993) ("The employer of a minor shall pay the earnings of the minor to the minor until the parent or guardian entitled to the earnings gives the employer notice that the parent or guardian claims the earnings."); IND. CODE ANN. § 31-34-20-6 (Michie 1997); MICH. COMP. LAWS ANN. § 722.2 (West 1997); MISS. CODE ANN. § 93-13-1 (1999); MO. ANN. STAT. § 452.150 (West 2000); MONT. CODE ANN. § 40-6-235 (1999); N.J. STAT. ANN. § 9:1-1 (West 1999); N.M. STAT. ANN. § 32A-21-5 (Michie 2003); N.D. CENT. CODE § 14-09-17 (2003); OHIO REV. CODE ANN. § 2111.08 (Anderson 2002); 10 OKLA. STAT. § 17 (2001); R.I. GEN. LAWS § 33-15.1-1 (1996); S.C. CODE ANN. § 20-7-100 (Law. Co-op. 2004); S.D. CODIFIED LAWS § 25-5-12 (Michie 2002).

65. ZELIZER, *supra* note 52, at 100-01.

66. THOMAS DUBLIN, *WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS, 1826-1860* 174 (2d ed., Columbia Univ. Press

were often combined with that of their parents in a “family wage system,” where the family was hired and fired together.<sup>67</sup> For many families with employed children during that period, the combined wages of the child workers constituted over half of the family income.<sup>68</sup> In the landmark case of *Hammer v. Dagenhart*,<sup>69</sup> Roland Dagenhart argued that the federal Keating-Owen Child Labor Act denied him his vested right to the earnings of his minor sons.<sup>70</sup> Today, the FLSA mandates that employers pay workers their compensation,<sup>71</sup> but many state laws may still give control over the earnings of unemancipated children to parents.<sup>72</sup>

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1979).

67. HINDMAN, *supra* note 36, at 35-36.

68. DUBLIN, *supra* note 66, at 173. A male-headed family with three working children received approximately 65% of the annual family income from the children's labor. *Id.* This percentage would be even higher in the many female-headed households because female wages were considerably less than male wages. *Id.*

69. 247 U.S. 251 (1918).

70. Woodhouse, *supra* note 60, at 1064 n.358 (citing to the record of *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 657 (1941)).

71. “Every employer shall pay to each of his employees . . . wages at the following rates: . . . not less than \$5.15 an hour . . .” 29 U.S.C. § 206(a)(1) (2000). Employees under the age of twenty may be paid a subminimum wage of \$4.25 an hour for the first ninety days of employment. 29 U.S.C. § 206(g)(1). Employers may not, however, displace other employees for the purpose of hiring workers at a subminimum wage. 29 U.S.C. § 206(g)(2).

72. *See, e.g.,* OR. REV. STAT. § 109.030 (2003) (“The rights and responsibilities of the parents, in the absence of misconduct, are equal, and the mother is as fully entitled to the custody and control of the children and their earnings as the father.”); TENN. CODE ANN. § 34-1-102(a) (2002) (“Each parent has equal powers, rights and duties with respect to the custody of each of their minor children and the control of the services and earnings of each minor child . . .”); TEX. FAM. CODE ANN. § 3.103 (Vernon 1996) (“During the marriage of the parents of an unemancipated minor, . . . the earnings of the minor are subject to the joint management, control, and disposition of the parents of the minor, unless otherwise provided by agreement of the parents or by judicial order.”). Some state statutes also specifically address the method of payment by employers to minor employees. Rhode Island's statute on the earnings of minors states, in pertinent part:

The natural guardians shall have equal powers and rights . . . concerning the custody of the minor children, and both shall be entitled to their services, and to their earnings, the payment of which to either parent shall be a valid and sufficient discharge to the employer of the children until after notice in writing has been given to him or her by both or either of the parents of their intention to both claim the earnings.

R.I. GEN. LAWS § 33-15.1-1(a) (1996); *see also* *Scheller v. Bowery Sav. Bank*, 630 N.Y.S.2d 62, 64 (N.Y. 1995).

### *B. Early Regulation in the States*

Ideology,<sup>73</sup> laissez-faire economic policies,<sup>74</sup> and the considerable financial benefit from employing children blocked any serious consideration of the effects of child labor before the Civil War. Unions supported child labor restrictions, partly for humanitarian reasons and partly for economic considerations relating to depressed wages and adult unemployment.<sup>75</sup> Mary Harris, usually referred to as Mother Jones, constantly advocated on behalf of working children and their parents.<sup>76</sup> Resistance to regulation was strong, however, and the political weakness of the labor movement made reform more easily accepted when characterized as child welfare proposals rather than labor reforms.<sup>77</sup> The most successful proponents for child labor regulation were religious organizations, women's groups, and broad coalitions.<sup>78</sup> Moreover, educators began insisting that work not interfere with children's formal education.<sup>79</sup> By the time of the Civil War, a handful of states had passed school attendance laws, but most of these laws contained no enforcement provisions.<sup>80</sup> Pressure for compulsory education grew at the same time as pressure for child labor regulation, and the two movements developed simultaneously between 1830 and 1930.<sup>81</sup>

Legal control of child labor was agonizingly slow and piecemeal. In 1833,

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73. See, e.g., WOOD, *supra* note 54, at 35.

74. Laissez-faire economics was based upon the social theory that society would be advanced by government noninterference in the labor market. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 670 (1984); see also *Lochner v. New York*, 198 U.S. 45 (1905); *infra* notes 103-04 and accompanying text.

75. Abolition of child labor was included in the constitutions of the Knights of Labor and the Federation of Organized Trade Unions, which later became the American Federation of Labor (AFL). HINDMAN, *supra* note 36, at 49. As a young labor leader in New York, Samuel Gompers pushed for regulation of child labor, and later, as President of the AFL, he consistently supported child labor reform. *Id.*; see also JEREMY FELT, *HOSTAGES OF FORTUNE: CHILD LABOR REFORMS IN NEW YORK STATE* 10-13, 60, 196-97 (1965); SAMUEL GOMPERS, *LABOR AND THE COMMON WELFARE* 129 (1919).

76. MOTHER JONES, *THE AUTOBIOGRAPHY OF MOTHER JONES* 71-93, 114-31 (Mary Field Parton ed., 1980).

77. HINDMAN, *supra* note 36, at 50.

78. WOOD, *supra* note 54, at 50 ("It is unlikely . . . that the campaign against child labors would have made such rapid headway after 1900 had it not been for the pressure brought to bear on both public opinion and legislatures by voluntary groups such as the consumers' leagues, state charities aid associations, federations of women's clubs, and the child labor committees.").

79. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE* 1033 (2000).

80. 1 *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY: 1600-1865* 624 (Robert H. Bremner ed., 1970) [hereinafter *CHILDREN AND YOUTH*, VOL. I].

81. WAYNE J. URBAN & JENNINGS L. WAGONER, JR., *AMERICAN EDUCATION, A HISTORY* 171-73 (1999).

New York's legislature failed to pass a compulsory school attendance law,<sup>82</sup> despite the fact that children often worked twelve to fourteen hours per day, longer hours than were required of adult inmates in New York prisons.<sup>83</sup> Massachusetts passed the first child labor law in 1836, prohibiting employment of children under fifteen years of age in industry, unless they had attended school for at least three months during the previous year.<sup>84</sup> In the mid-1800s, a few states began setting minimum age requirements for work<sup>85</sup> and limiting working hours.<sup>86</sup> Momentum for child labor regulation increased near the beginning of the twentieth century.<sup>87</sup> A growing "progressive" movement opposed child labor as destructive of family values and inconsistent with the child's and society's long-term interests.<sup>88</sup> By 1907, forty-two states had some type of child labor legislation.<sup>89</sup> Even southern states, where child labor was widespread, began passing regulatory legislation.<sup>90</sup> Widespread violations of these laws occurred, however, primarily because of the lack of enforcement and ignorance.<sup>91</sup>

Clearly, an irregular web of state laws could not solve this national problem.<sup>92</sup> Economic concerns created disincentives for states to regulate the problem, particularly when neighboring states had less stringent laws and thus

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82. CHILDREN AND YOUTH, VOL. I, *supra* note 80, at 619.

83. *Id.* at 617.

84. *Id.* at 921.

85. The minimum ages ranged from nine to thirteen years old. Proof of age was not required in any of the early minimum age statutes. CHILDREN AND YOUTH, VOL. I, *supra* note 80, at 627. Additionally, a number of these laws allowed younger children in poor families to work under a "hardship exemption." HINDMAN, *supra* note 36, at 62.

86. Most of the states regulating hours in the mid-1800s limited minor workers to ten hours per day. CHILDREN AND YOUTH, VOL. I, *supra* note 80, at 628. Many hour limitation laws contained a "special contract" provision allowing employees to work longer hours. HINDMAN, *supra* note 36, at 62.

87. As in many social welfare issues, the United States lagged behind Europe. The first law regulating child labor was approved in Prussia in 1839; France followed in 1841. PAUL PERIGORD, THE INTERNATIONAL LABOR ORGANIZATION: A STUDY OF LABOR AND CAPITAL IN COOPERATION 39 (1926); Carlos Crespo, *When Labor Went Global: The Road to the International Labor Organization*, 37 REV. JUR. U.P.R. 129, 132 (2002).

88. MARVIN J. LEVINE, CHILDREN FOR HIRE 20-21 (2003).

89. 41 CONG. REC. 1809-10 (1907).

90. 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY: 1866-1932 679 (Robert H. Bremner ed., 1971) [hereinafter CHILDREN AND YOUTH, VOL. II].

91. Violators were rarely fined or otherwise punished, and many parents were unaware of any restrictions on employing children. CHILDREN AND YOUTH, VOL. I, *supra* note 80, at 628-30.

92. In describing the inadequacy of state laws and the widespread violation, Senator Beveridge asserted, "States can not properly deal with this National evil." 41 CONG. REC. 1811.

reaped an economic benefit.<sup>93</sup> Employers could play one state against another. At the same time, reform efforts varied by state and region. In 1907, Senator Albert Beveridge of Indiana, a prominent proponent of child labor restriction, made an historic three-day speech on the U.S. Senate floor.<sup>94</sup> Senator Beveridge characterized the situation as follows:

Here is an abstract of the State laws upon the subject of child labor. There are not six of them alike. Some have no child-labor laws at all; others are worse than any laws, because they are pretenses at labor legislation which make the people and the country think that something has been done, when, as a matter of fact, nothing has been done, and the ruin that went on before without the sanction of the law continues under the sanction of the law.<sup>95</sup>

Because of the varied state approaches to the child labor problem, federal legislation was the only realistic solution.

### *C. Federal Developments Until 1937*

In 1906, Senator Beveridge and Representative Herbert Parson introduced the first federal statutory proposals restricting employment of children in factories and mines, but the measure failed.<sup>96</sup> In 1907, federal legislation authorized the Secretary of Commerce and Labor "to investigate and report upon the industrial, social, moral, educational, and physical condition of women and child workers in the United States."<sup>97</sup> Ultimately, the legislation resulted in nineteen volumes, published by the federal government, detailing the problems associated with employment of women and children.<sup>98</sup>

Congress passed the first federal child labor law, the Keating-Owen Act on Child Labor, in 1916.<sup>99</sup> Under the Act, neither mines, where children under age sixteen worked, nor factories that employed children under fourteen, could ship commodities in interstate commerce.<sup>100</sup> The Act also limited the working hours of children ages fourteen to sixteen to eight hours per day and only six

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93. *Id.* at 1808.

94. JOHN BRAEMAN, ALBERT J. BEVERIDGE: AMERICAN NATIONALIST 116 (1971). For the transcript of Beveridge's speech, see 41 CONG. REC. 1807-26.

95. 41 CONG. REC. 1808.

96. John Braeman, *Alfred J. Beveridge and the First National Child Labor Bill*, IND. MAG. HIST., Mar. 1964, at 1, 36.

97. Act of Jan. 29, 1907, Pub. L. No. 59-41, 34 Stat. 866.

98. Report on Condition of Woman and Child Wage-Earners in the United States, S. DOC. NO. 645 (2d Sess. 1913).

99. Keating-Owen Act on Child Labor, Pub. L. No. 64-249, 39 Stat. 675 (1916).

100. *Id.* § 1, 39 Stat. at 675.

days per week, and prohibited work after 7:00 p.m. and before 7:00 a.m.<sup>101</sup> State officials assisted in the enforcement of the Act and, in the nine months the law was in effect, almost 700 inspections revealed 293 establishments in violation of child labor statutes.<sup>102</sup>

During the *Lochner* era,<sup>103</sup> the federal judiciary, led by the U.S. Supreme Court, aggressively protected economic rights under the Due Process Clause and used federalism concepts to limit Congress's ability to regulate the economy.<sup>104</sup> In this judicial climate, the Supreme Court in *Hammer v. Dagenhart* declared the Keating-Owen Act unconstitutional.<sup>105</sup> The suit was brought by a poor father of two employed sons,<sup>106</sup> represented by a distinguished group of nationally known corporate attorneys presenting familiar constitutional arguments.<sup>107</sup> Before the Court, Solicitor General John W. Davis argued that ruinous competition among the states created an insurmountable barrier to nonfederal regulation of child labor.<sup>108</sup> The Court rejected the argument<sup>109</sup> and held that the statute was beyond Congress's

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101. *Id.* Violations of these provisions were punishable by a fine of up to \$200 per offense for a first conviction, and a fine of up to \$1000 or imprisonment for subsequent convictions. *Id.* § 5, 39 Stat. at 675-76.

102. CHILDREN AND YOUTH, VOL. II, *supra* note 90, at 708-09.

103. *Lochner v. New York*, 198 U.S. 45 (1905) (declaring unconstitutional a New York law that set the maximum hours bakers could work because it interfered with "freedom of contract" and was not justified by a legitimate policy purpose). The term "*Lochner* Era" is commonly used to describe the period, between the late 1890s and 1937, when the U.S. Supreme Court struck down many state and federal laws as unconstitutional because they interfered with "freedom of contract" or expanded congressional power at the expense of state prerogatives.

104. See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating state law setting minimum wage for women); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (declaring unconstitutional maximum prices for gasoline); *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926) (invalidating state law prohibiting use of rags and debris in manufacturing bedding); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (striking down state required standardized weights for bread loaves); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating federal minimum wage for women).

105. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); see also *Symposium*, *Brown v. Board of Education: An Exercise in Advocacy*, 52 MERCER L. REV. 581, 596 (2001).

106. One son was under the age of fourteen, the other under the age of sixteen, allowing both the minimum age and the limited hours provisions to be challenged in a single suit. *Hammer*, 247 U.S. at 252. Interestingly, later in life, Reuben Dagenhart, the younger son, said he would have been "a lot better off" if his employer had won the suit because he really needed the education he did not receive. CHILDREN AND YOUTH, VOL. I, *supra* note 80, at 716.

107. WOOD, *supra* note 54, at 97.

108. *Hammer*, 247 U.S. at 256-57; see also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1427-32 (1987).

109. *Hammer*, 247 U.S. at 273 ("There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over



power under the Commerce Clause because it regulated “local production,” not interstate transportation.<sup>110</sup> Control over child labor was vested in the states under their traditional police powers, and Congress could not interfere.<sup>111</sup>

The year after *Hammer v. Dagenhart* was decided, Congress once again sought to regulate child labor, this time under its taxing power. The Child Labor Tax Law<sup>112</sup> assessed a 10% tax on the profits of manufacturing establishments that used child labor in violation of the minimum age requirements and limited hours of the Keating-Owen Act.<sup>113</sup> This Act was clearly a regulatory provision and only incidentally a revenue generator.<sup>114</sup> Like the Keating-Owen Act, the Child Labor Tax Act was short-lived. In 1922, the Supreme Court in *Bailey v. Drexel*<sup>115</sup> declared the tax unconstitutional as an improper regulation of a state function.<sup>116</sup> Chief Justice William Howard Taft argued that the Act was not a tax but rather a penalty assessed to regulate what the Constitution had reserved exclusively for state power.<sup>117</sup>

After two unsuccessful federal attempts at legislating child labor, child labor reform advocates retained only one practical alternative.<sup>118</sup> Samuel Gompers, President of the American Federation of Labor, noted that “the Supreme Court deals with childhood exactly as it would deal with pig iron. . .

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others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.”).

110. *Id.* at 272. The *Hammer* dissent focused on the many instances where the Court had upheld regulations passed under the Commerce Clause for reasons indistinguishable from the majority’s rationale. *Id.* at 277-81 (Holmes, J., dissenting). The dissent also insisted that Congress’s power to regulate commerce was unqualified under the Constitution, *id.* at 277, and that although states could regulate their own domestic commerce, “when they seek to send their products across the state line they are no longer within their rights,” *id.* at 281.

111. *Hammer*’s holding was, of course, in striking contrast to numerous prior decisions. *See, e.g.,* *Hoke v. United States*, 227 U.S. 308, 323 (1913) (“Congress[’s] . . . power over transportation ‘among the several states’ . . . is complete in itself,” and rules adopted under the Commerce Clause “may have the quality of police regulations.”).

112. Child Labor Tax Acts, Pub. L. No. 65-254, § 1200, 40 Stat. 1057, 1138 (1919).

113. Children under fourteen could not be employed. The Act limited the working hours of children ages fourteen to sixteen to eight hours per day, six days per week, and prohibited work after 7:00 p.m. and before 6:00 a.m. *Id.*

114. HINDMAN, *supra* note 36, at 72 (noting that the Act raised approximately \$41,000 in revenue, while costing over \$300,000 to administer).

115. 259 U.S. 20 (1922).

116. *Id.* at 44.

117. *Id.* at 39.

118. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 256 (1996).

[A] Constitutional amendment is needed to complete the work quickly.”<sup>119</sup> During the spring of 1924, the House of Representatives, by a vote of 297-68, and the Senate, by a vote of 61-23, approved a Child Labor Amendment.<sup>120</sup> A lengthy battle, however, raged at the state level where an alliance of conservative groups opposed attempts to ratify the Amendment.<sup>121</sup> Opponents mustered a coalition of social and business groups, including the Sentinels of the Republic, the Woman Patriots, the National Association of Manufacturers, the American Farm Bureau Federation, and various religious leaders.<sup>122</sup> Ultimately, the necessary two-thirds of state legislatures failed to ratify the Amendment.<sup>123</sup>

The next attempt at child labor reform came in the midst of the nation’s

119. Samuel Gompers, *Let Us Save the Children*, 29 AM. FEDERATIONIST 413, 413-14 (1922).

120. The Amendment read as follows:

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

Section 2. The power of the several States is unimpaired by this article, except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

66 CONG. REC. 3212 (1925).

121. KYVIG, *supra* note 118, at 257-59.

122. See generally Bill Kauffman, *The Child Labor Amendment Debate of the 1920's; or, Catholics and Mugwumps and Farmers*, 10 J. LIBERTARIAN STUD. 139 (1992) (describing issues of federalism and states’ rights in debates over the proposed amendment). The President of the American Bar Association claimed that the Amendment was “a communistic effort to nationalize children, making them primarily responsible to the government instead of to their parents.” *Id.* at 140. Congressman Fritz G. Lanham likewise mocked the Amendment as enjoining children to “obey your agents from Washington, for this is right. Honor thy father and thy mother, for the Government has created them but a little lower than the Federal agent. Love, honor, and disobey them.” *Id.* Many of these opposition groups also actively opposed other reforms being proposed at the time. J. STANLEY LEMMONS, *THE WOMAN CITIZEN: SOCIAL FEMINISM IN THE 1920'S* 25-30, 45 (1973).

123. WALTER L. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 170-71 (1970). The main objections to the proposed amendment were that it interfered with states’ rights, curtailed parents’ control of the child, especially where the child labored on the family farm, and was a “communist inspired plot.” *Id.*; see also 66 CONG. REC. 2677 (1925) (“This proposed amendment would take from the States and from parents the entire control of all children. . . . It is a direct and terrific attack upon home life, as well as upon the rights of individual States.”). Opponents greatly exaggerated the reach of child labor regulation, suggesting to the public that it would be illegal for children to perform household chores for their parents. A political cartoon from 1925 depicted two lounging adolescents refusing to help their parents with chopping wood and washing dishes, claiming their assistance in these tasks would violate the law. The cartoon’s inscription reads “Under the Twentieth Amendment.” W. A. Ireland, *Under the Twentieth Amendment*, COLUMBUS (OHIO) DISPATCH, Jan. 20, 1925, reprinted in CHILDREN AND YOUTH, VOL. II, *supra* note 90, at 718.

most severe depression. In 1933, Congress passed the National Industrial Recovery Act (NIRA)<sup>124</sup> as part of President Franklin D. Roosevelt's New Deal.<sup>125</sup> The Act's purposes included reemployment of workers, creation of decent wages, and prevention of unfair competition.<sup>126</sup> Child labor was seen as a significant factor in all of these problems. The NIRA empowered trade associations, organized by industry and unions, to create voluntary regulations which, when approved by the President, would become an enforceable industrial code.<sup>127</sup> Most of the codes prohibited employees under eighteen from performing "hazardous work" and set minimum age requirements for workers.<sup>128</sup> The U.S. Supreme Court declared the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*.<sup>129</sup> Despite being declared unconstitutional, the NIRA child labor provisions became the model for the FLSA.

#### D. The FLSA

In the mid-1930s, still suffering from an economic depression, many Americans saw child labor as a cause of both low wages and underemployment of adult workers.<sup>130</sup> A uniform federal law was essential to protect goods in more progressive child labor states from unfair competition. As Representative Schneider from Wisconsin noted:

States which have already adopted laws to correct these evils within their borders will welcome the help of similar high

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124. National Industrial Recovery Act (NIRA), Pub. L. No. 73-67, 48 Stat. 195.

125. Andrew J. Samset, *Child Labor and the New Millennium*, 21 WHITTIER L. REV. 69, 75 (1999).

126. 77 CONG. REC. 6236 (1933).

127. NIRA § 3, 48 Stat. at 196.

128. Samset, *supra* note 125, at 75. The NIRA was responsible for blocking 100,000 child laborers under the age of sixteen from the work force; when the statute was declared unconstitutional, those children went back to work. See *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. and Labor and the House Comm. on Labor*, 75th Cong. 1483-85 (1937) (remarks of Hon. Francis Perkins, Secretary of Labor).

129. 295 U.S. 495, 521, 524 (1935) (upholding a Second Circuit decision that held unconstitutional wage and hours provisions regulating the wholesale poultry trade because Schechter's Market was not actually "in" interstate commerce, and invalidating the NIRA).

130. Representative Sirovich asserted that if certain exceptions in the child labor provisions were allowed, then "a million boys and girls under 16 will still work in the mills, the mines, the looms, and the factories producing goods that enter interstate commerce and taking the positions of men entitled to them." 82 CONG. REC. 1692 (1937). Representative Voorhis added, "And undercutting the wage scale of their fathers who ought to have their places." *Id.* (emphasis added).

standards for the country at large. Wisconsin and other States with a 16-year standard for child employment too long have been faced with the competition of goods manufactured in low-standard States. . . . States have found themselves frequently powerless to enact adequate laws in the face of pressure from these competing forces. It remains for the Congress to assist in producing a universal standard to aid the States in their good intentions.<sup>131</sup>

But economic considerations were only part of the justification for federal regulation of child labor. Representative Schneider further asserted that “[t]he moral effect of these provisions by itself is sufficient reason for our favorable action upon them.”<sup>132</sup> Ultimately, after a lengthy debate, Congress enacted the FLSA, including its child labor provisions, in 1938.<sup>133</sup>

By the time a case challenging the constitutionality of the FLSA reached the Supreme Court, a number of important developments had occurred. In a series of cases involving substantive due process and the scope of national power, Justice Roberts reversed direction and cast the deciding fifth vote to uphold legislative initiatives dealing with economic problems.<sup>134</sup> In *West Coast Hotel v. Parrish*,<sup>135</sup> the Supreme Court, by a vote of 5-4, upheld a state statute establishing a minimum wage for women employees.<sup>136</sup> One year later, the Supreme Court signaled a new policy of judicial deference to national regulation based on the Commerce Clause. In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>137</sup> the Court upheld the National Labor Relations Act, effectively overruling the limits that the Court had placed on Congress’s power during the

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131. 83 CONG. REC. 7400-01.

132. *Id.* at 7400. Recognizing that adolescent workers are particularly vulnerable to injury, Representative Schneider characterized the ages of sixteen to eighteen as “the dangerous age when venturesome youth are only too apt to experiment with machinery, electricity, and other hazards of industry so that the result is often injury or death.” 82 CONG. REC. 1822.

133. Members of Congress proposed seventy-two amendments during the legislative battle over the FLSA. Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 28 (an updated version of the article is available at <http://www.dol.gov/asp/programs/history/flsa1938.htm>). Most of the changes “sought exemptions, narrowed coverage, lowered standards, weakened administration, limited investigation, or in some way weakened the bill.” *Id.*

134. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 471 (2001).

135. 300 U.S. 379 (1937).

136. *Id.* at 400. Although the minimum wage for women was challenged as a violation of freedom of contract, Chief Justice Hughes rejected the argument: “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.” *Id.* at 391.

137. 301 U.S. 1 (1937).

Lochner era.<sup>138</sup> It was thus not surprising when the Court upheld the FLSA in *United States v. Darby*,<sup>139</sup> overruling *Hammer v. Dagenhart*. Although *Darby* involved no child labor issues, the Supreme Court approved the FLSA in its entirety.<sup>140</sup>

While the FLSA constituted an enormous step forward in establishing national standards, the immediate gains were modest in practice. Although the Act was undoubtedly an educational and moral force, "in those areas where children are useful they continued to be employed."<sup>141</sup> Jonathon Grossman, historian at the DOL, noted that "[t]he law avoided some sectors of the work force where most abuses of child labor were concentrated."<sup>142</sup> Indeed, while approximately 850,000 children under sixteen were gainfully employed in 1938, only an estimated 50,000 were subject to the Act.<sup>143</sup> "Children in industrial agriculture, intrastate industries, the street trades, messenger and delivery service, stores, hotels, restaurants, beauty parlors, bowling alleys, filling stations, garages, etc., were outside the law."<sup>144</sup>

One Supreme Court decision quickly highlighted the limitations of the FLSA. In *Western Union Telegraph Co. v. Lenroot*,<sup>145</sup> the Court found that the Act did not apply to transmission of telegraph messages because no "goods" were produced in such work.<sup>146</sup> Since the *Lenroot* decision in 1945,

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138. *Id.* at 49.

139. 312 U.S. 100 (1940).

140. The majority held that the prohibition and regulation of wages and hours was within Congress's "plenary" power to regulate interstate commerce. *Id.* at 116-17. The power of Congress also included the regulation of intrastate activities that "so affect interstate commerce or the exercise of the power of Congress over it." *Id.* at 118. In another discussion, the Court noted that the FLSA was to "keep the arteries of commerce free from pollution by the sweat of child labor." *Lenroot v. W. Union Tel. Co.*, 52 F. Supp. 142, 147-48 (S.D.N.Y. 1943), *rev'd*, 323 U.S. 490 (1945). The Supreme Court in recent years has issued rulings once again restricting Congress's powers under the Commerce Clause. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). The basis of federal regulation of child labor, however, remains firm; goods sent into interstate commerce made by children definitely "affect" interstate commerce. *See, e.g., id.* at 559 ("[O]ppressive child labor" may be regulated under the Commerce Clause.).

141. Jeremy P. Felt, *The Child Labor Provisions of the Fair Labor Standards Act*, LAB. HIST., Fall 1970, at 478-79.

142. Grossman, *supra* note 133, at 29.

143. YOUTH: TRANSITION TO ADULTHOOD, REPORT OF THE PANEL ON YOUTH OF THE PRESIDENT'S SCIENCE ADVISORY COMMITTEE 36 (1974).

144. *Id.*

145. 323 U.S. 490 (1945).

146. *Id.* at 490. Suit was brought to enjoin Western Union from using messengers under sixteen, and car drivers between sixteen and eighteen, to transmit telegrams. *Id.* The messengers and drivers were employed lawfully under state law, but were engaged in "oppressive child labor" as defined by the FLSA. *Id.* The Court held that Western Union was not a producer of goods and did not "ship" goods in commerce within the meaning of §12(a)

the Supreme Court has not decided a single case regarding the substantive provisions of the FLSA or similar state statutes and regulations.<sup>147</sup>

### *E. Child Labor During World War II*

The initial version of the FLSA prohibited employment of children under sixteen.<sup>148</sup> When the United States entered World War II, the work force was soon exhausted. When a labor shortage emerged as males entered the armed services, women entered the work force in large numbers.<sup>149</sup> World War II also affected child labor. According to the DOL, “[c]ontrary to general belief, the early withdrawal of boys and girls from school was a greater factor in the expansion of the labor force than was the increase in the number of women working.”<sup>150</sup>

At the outset of World War II, the United States had historically low levels of child labor and high levels of school enrollment.<sup>151</sup> Following the outbreak of the war, school enrollment fell by 24% for fifteen- to eighteen-year-olds, while the number of fourteen- to seventeen-year-olds employed increased by 200%.<sup>152</sup> Illinois is illustrative: during 1943, the number of Illinois children who legally left school to go to work was 400% greater than in 1942.<sup>153</sup>

Nationally, young workers who were not attending school worked an average of forty-six hours per week.<sup>154</sup> The DOL recognized that many

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of the FLSA. *Id.* at 503-06.

147. The Supreme Court has, however, decided two cases dealing with procedural issues under the FLSA. In *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), the Court held that the two-year limitation period of the Portal to Portal Act was applicable to an action for liquidated damages and that the government’s cause of action accrued when the minors were employed. *Id.* at 65. Twenty-seven years later, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Court held that there was no violation of due process when money collected as civil penalty for employment of child labor was returned to the DOL as reimbursement for amounts spent in enforcing the Act. *Id.* at 252.

148. Grossman, *supra* note 133, at 25.

149. U.S. DOL, *Sources of Labor Supply for the War*, 57 MONTHLY LAB. REV., Aug. 1943, at 212-13.

150. *Id.*

151. Aruga, *supra* note 39, at 503; U.S. DOL, *Child-Labor Problems in Wartime*, 59 MONTHLY LAB. REV., Nov. 1944, at 1034-35 [hereinafter *Child-Labor Problems in Wartime*]; see also Ellen Greenberger, *Working in Teenage America*, in *WORK EXPERIENCE AND PSYCHOLOGICAL DEVELOPMENT THROUGH THE LIFE SPAN 14* (Jeylan T. Mortimer & Kathryn M. Borman eds., 1988). Of the fourteen- to fifteen-year-olds, only 3% of the boys and 1% of the girls were in the labor force at this time. Greenberger, *supra*, at 14.

152. Aruga, *supra* note 39, at 498. School enrollment for fifteen- to eighteen-year-olds fell by 1.2 million, and employment of fourteen- to seventeen-year-olds increased by over two million. *Id.*

153. *Child-Labor Problems in Wartime*, *supra* note 151, at 1034.

154. U.S. DOL, *Teen-Age Youth in the Wartime Labor Force*, 60 MONTHLY LAB. REV., Jan.

students who dropped out of school to partake in wartime labor were unlikely to return to school after the war.<sup>155</sup> Other consequences quickly emerged as the number of employed youths rose. For example, work accidents involving children increased. In Michigan, there was a 183% increase in compensable injuries to children,<sup>156</sup> and in Illinois, work accidents involving children rose 100% from 1942 to 1943.<sup>157</sup> The DOL attributed the increase both to the rise in the number of children employed generally and to the sharp increase in children employed in hazardous jobs.<sup>158</sup>

The type of work performed by young people during the war changed; a shift from primarily agriculture to a balance between agriculture, manufacturing, and services occurred.<sup>159</sup> In April of 1944, six times as many workers between the ages of fourteen and seventeen worked in manufacturing, and over seven times more worked in service jobs, than in 1940.<sup>160</sup> Manufacturing employed one-third of youths no longer attending school.<sup>161</sup> The service industries employed 15% of teenage workers in 1944 compared to only 6% in 1940.<sup>162</sup>

Limited enforcement of child labor restrictions and relaxation of state and federal regulations contributed to the drastic increase in young workers during World War II. For example, during 1943, Illinois had the highest level of illegally employed children, but only fourteen out of a total of 986 known violations were prosecuted.<sup>163</sup> In 1942, the Secretary of War requested that the DOL grant an exemption to the eighteen-year-old minimum age limit for hazardous occupations, which the DOL granted.<sup>164</sup> The Children's Bureau, Department of Agriculture, U.S. Employment Service, and the Office of Education prepared a policy statement encouraging the recruitment of young workers for agricultural jobs and gave approval for children to work during the school year.<sup>165</sup> In 1943, forty-four state legislatures considered child labor bills, and most states softened strict restrictions on child labor.<sup>166</sup> Both

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1945, at 7, 15 [hereinafter *Teen-Age Youth in Wartime Labor*].

155. *Id.* at 17.

156. *Child-Labor Problems in Wartime*, *supra* note 151, at 1034.

157. *Id.*

158. *Id.*

159. *Teen-Age Youth in Wartime Labor*, *supra* note 154, at 10.

160. Aruga, *supra* note 39, at 509.

161. *Teen-Age Youth in Wartime Labor*, *supra* note 154, at 13.

162. *Id.* at 11. The DOL also noted that 20% of young workers still attending school were employed in retail trade. *Id.*

163. *Child-Labor Problems in Wartime*, *supra* note 151, at 1034.

164. Aruga, *supra* note 39, at 519.

165. *Id.*

166. *Id.* at 521.

California and Massachusetts granted their governors the power to permit children to work,<sup>167</sup> and many states lowered the minimum age for certain jobs.<sup>168</sup>

### *III. The Current Legal Regime*

#### *A. Federal Statutory Provisions*

Despite economic and social transformations since World War II, the FLSA has remained substantially unchanged. The FLSA outlaws “oppressive” and “hazardous” work for minors in commerce or in the production of goods for commerce.<sup>169</sup> Persons under eighteen years of age may not be employed in mining or manufacturing or “in any occupation which the Chief of the Children’s Bureau in the Department of Labor shall . . . declare to be particularly hazardous for the employment of children . . . or detrimental to their health or well being.”<sup>170</sup> Sixteen is the usual minimum age for employment, but the Secretary may permit employment of fourteen- to sixteen-year-olds in work that does not interfere with schooling and is not detrimental to the child’s “health and well-being.”<sup>171</sup> The Act restricts youths under sixteen to no more than three hours of work per day and eighteen hours per week in nonhazardous tasks in retail, food service, and gasoline service stations when school is in session.<sup>172</sup> During vacations, a minor under sixteen

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167. *Id.*

168. *Id.* Delaware, for example, changed its laws to allow fourteen-year-olds to work in milk delivery operations as early as 5:00 a.m. and as late as midnight. *Id.*

169. 29 U.S.C. § 212(c) (2000). “Oppressive child labor” is defined as a condition of employment under which (1) any employee under the age of sixteen years is employed . . . or (2) any employee between the ages of sixteen and eighteen years is employed . . . in any occupation which the Chief of the Children’s Bureau in the Department of Labor . . . shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being . . . .

*Id.* § 203(l). Even this is conditioned by specific exemptions for occupations other than manufacturing and mining — for example, agriculture — unless the DOL determines such employment is confined to periods that will not interfere with their school and to conditions that will not interfere with their health and well-being. *Id.*

170. If the occupation has been declared hazardous by the Secretary of Labor, eighteen is the minimum age to work in that job. *See* 29 C.F.R. § 570.120 (2003). Those designations have remained unchanged since 1975. *Id.* § 570.67. NIOSH has made recommendations for changes to these hazardous occupation orders. *See* NIOSH REPORT, *supra* note 10. However, no action has been taken.

171. *See* 29 C.F.R. §§ 570.1-570.129.

172. *Id.* § 570.35.



may work a maximum of eight hours per day and forty hours per week.<sup>173</sup> With the exception of barring hazardous occupations, adolescents over sixteen have no federal restrictions on the number of hours or the time of day they may work.<sup>174</sup> There are no parental or school consent requirements imposed by federal law.

When an employer violates the child labor provisions of the FLSA, the DOL must determine an appropriate penalty for the violation.<sup>175</sup> Although the Act originally contained only criminal penalties, the FLSA now provides for civil remedies.<sup>176</sup> Employers who willfully violate the Act may be fined not more than \$11,000 or, after a prior conviction for violation of the provisions, imprisoned for not more than six months or both.<sup>177</sup> The Secretary of Labor, subject to the direction and control of the Attorney General, may also petition a federal district court for injunctive relief.<sup>178</sup>

### *B. State Laws*

Although the FLSA does not preempt the field of child labor legislation,<sup>179</sup> state provisions tend to follow federal law. Many state statutes provide minimum age requirements, limit working hours, and prohibit employment in hazardous occupations. All states place some limits on night work for minors under age sixteen.<sup>180</sup> Similar to the FLSA, sixteen- and seventeen-year-olds in most states have legal freedom to choose the number of hours they will work.<sup>181</sup> State child labor laws typically impose criminal or civil penalties on

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173. In addition, the Act also restricts fourteen- and fifteen-year-olds from work during school hours, before 7:00 a.m., or after 7:00 p.m. (9:00 p.m. during summer, nonschool months). *Id.*

174. *See* Schmidt v. Reich, 835 F. Supp. 435, 444 (N.D. Ill. 1993).

175. 29 U.S.C. § 216(e). In determining the amount of the penalty, the Secretary is to consider: (1) its appropriateness relative to the size of the business; and (2) the gravity of the violation, including the number of times violations have occurred, aggravating factors such as falsification of records, and the employer's record of previous child labor violations, if any. *Id.* Administrative appeal is available before an administrative law judge from the Wage and Hour Division of the DOL. The potential civil penalty currently ranges from \$275 to \$11,000. *Id.*

176. *Id.* § 216.

177. *Id.* § 216(a).

178. *Id.* § 212(b).

179. *Id.* § 218(a).

180. For a summary of the major provisions of state child labor laws, see Andrea Giampetro-Meyer & Timothy S. Brown, *Protecting Society from Teenage Greed: A Proposal for Revising the Ages, Hours and Nature of Child Labor in America*, 25 AKRON L. REV. 547, 557-63 (1992).

181. ALA. CODE § 25-8-33 (1975); ALASKA STAT. § 23.10.332 (Michie 2002); ARIZ. REV. STAT. ANN. § 23-232 (West 2002); GA. CODE ANN. § 39-2-11 (Harrison 1987); HAW. REV. STAT. § 390-2 (1993); IDAHO CODE § 44-1301 (Michie 2001); 820 ILL. COMP. STAT. ANN. 205/3 (West Supp. 2004); IOWA CODE ANN. § 92.2 (West 1996); KAN. STAT. ANN. § 38-603

employers for violating the statute.<sup>182</sup>

While there are many similarities, important differences exist between state and federal law. Thirty-five states require children under age sixteen to secure government-issued work permits or certificates,<sup>183</sup> while seventeen states require permits for teens over sixteen.<sup>184</sup> Sometimes these laws require school officials to certify satisfactory performance in school.<sup>185</sup> Ten states require parental consent to issue an employment certificate to a child under sixteen.<sup>186</sup> Five additional states require both parental and school consent for children under sixteen.<sup>187</sup> Only six jurisdictions require parental consent for

(2002); LA. REV. STAT. ANN. § 23:211 (West 2001); MINN. STAT. ANN. § 181A.04 (West 2000); MISS. CODE ANN. § 71-1-21 (1999); MO. ANN. STAT. § 294.030 (West 2000); MONT. CODE ANN. § 41-2-115 (1999); NEB. REV. STAT. § 48-310 (2003); NEV. REV. STAT. § 609.240 (2003); N.M. STAT. ANN. § 50-6-3 (Michie 2003); N.C. GEN. STAT. § 95-25.5 (2001); OHIO REV. CODE ANN. § 4109.02 (Anderson 2002); 40 OKLA. STAT. § 75 (2001); R.I. GEN. LAWS § 28-3-1 (1996); S.D. CODIFIED LAWS § 60-12-1 (Michie Supp. 2003); TEX. LAB. CODE ANN. § 51.013 (Vernon 1996); UTAH CODE ANN. § 34-23-202 (2000); VT. STAT. ANN. tit. 21, § 434 (1989); VA. CODE ANN. § 40.1-78 (Michie 2003); W. VA. CODE ANN. § 21-6-7 (Michie 2003); WYO. STAT. ANN. § 27-6-110 (Michie 2003).

182. See, e.g., MICH. COMP. LAWS ANN. § 409.122 (West 1997).

183. ALA. CODE § 25-8-45; ALASKA STAT. § 23.10.332; ARK. CODE ANN. § 11-6-109 (Michie 1987); CAL. LAB. CODE § 1309.5 (West 1993); CONN. GEN. STAT. ANN. § 31-23 (West 2002); DEL. CODE ANN. tit. 19, § 504 (2003); GA. CODE ANN. § 39-2-11; HAW. REV. STAT. § 390-3; 820 ILL. COMP. STAT. ANN. 205/9; IND. CODE ANN. § 20-8.1-4-1 (Michie 1997); IOWA CODE ANN. § 92.2; KAN. STAT. ANN. § 38-604; LA. REV. STAT. ANN. § 23:181; ME. REV. STAT. ANN. tit. 26, § 775 (West Supp. 2003); MD. CODE ANN., LAB. & EMPL. § 3-206 (2004); MASS. GEN. LAWS ANN. ch. 149, § 71 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. § 409.104; MINN. STAT. ANN. § 181A.04; MISS. CODE ANN. § 71-1-19; MO. ANN. STAT. § 294.027; NEB. REV. STAT. § 48-303; N.H. REV. STAT. ANN. § 276-A:5 (2001); N.J. STAT. ANN. § 34-2-21.7 (West 1999); N.M. STAT. ANN. § 50-6-2; N.Y. LAB. LAW § 132 (McKinney 2001); N.C. GEN. STAT. § 95-25.5; N.D. CENT. CODE § 34-07-02 (2003); OHIO REV. CODE ANN. § 4109.02; 40 OKLA. STAT. § 77; PA. STAT. ANN. tit. 43, § 49 (West 1992); R.I. GEN. LAWS § 28-3-3; VT. STAT. ANN. tit. 21, § 431; VA. CODE ANN. § 40.1-78; WASH. REV. CODE § 49.1 (1997); WIS. STAT. ANN. § 103.70 (West 2004).

184. ALA. CODE § 25-8-45; ALASKA STAT. § 23.10.332; CAL. LAB. CODE § 1308.5; CONN. GEN. STAT. § 31-23; DEL. CODE ANN. tit. 19, § 504; GA. CODE ANN. § 39-2-11; HAW. REV. STAT. § 390-3; IND. CODE ANN. § 20-8.1-4-1; LA. REV. STAT. ANN. § 23:181; MD. CODE ANN., LAB. & EMPL. § 3-206; MICH. COMP. LAWS ANN. § 409.104; N.J. STAT. ANN. § 34-2-21.7; N.Y. LAB. LAW § 132; N.C. GEN. STAT. § 95-25.5; PA. STAT. ANN. tit. 43, § 49; WASH. REV. CODE § 49.12.123; WIS. STAT. ANN. § 103.70.

185. See, e.g., MICH. COMP. LAWS ANN. § 409.104; ME. REV. STAT. ANN. tit. 26, § 775.

186. ALASKA STAT. § 23.10.332; ARK. CODE ANN. § 11-6-109; CAL. LAB. CODE § 1308; LA. REV. STAT. ANN. § 23:184; MD. CODE ANN., LAB. & EMPL. § 3-206; N.H. REV. STAT. ANN. § 276-A:5; N.C. GEN. STAT. § 95-25.5; N.D. CENT. CODE § 34-07-02; PA. STAT. ANN. tit. 43, § 49; WASH. REV. CODE § 49.12.121.

187. ALA. CODE § 25-8-48; IND. CODE ANN. §§ 20-8.1-4-7, 20-8.1-4-15; IOWA CODE §§ 92.2, 92.11; N.J. STAT. ANN. §§ 34-2-21.3, 34-2-21.7; R.I. GEN. LAWS § 28-3-2.

adolescents sixteen and older to work,<sup>188</sup> while only three states require both parental and school consent for these youths to work.<sup>189</sup>

Our current legal regime reflects a remarkably laissez-faire response to the millions of youths in America's workplaces. Especially in the case of older teens, federal and state statutes create few restrictions on their labor. There is little legal protection for parental input and control of youthful decisions regarding work and school. The consequences of this legal vacuum are great.

#### IV. The Consequences of American Child Labor

##### A. Adolescent Risk-Creating Behavior

As a class, adolescents tend to engage in risk-creating behavior.<sup>190</sup> Defiance and self-gratification frequently motivate behavior.<sup>191</sup> The results are as predictable as they are tragic. One-half of U.S. adolescents are within moderate or greater risk of unsafe sexual behavior, teenage pregnancy, and childbearing, abuse of drugs or alcohol, academic failure and removal from school, or behaviors creating interaction with police and court systems.<sup>192</sup> An astonishing 10% of children in this age range engage in all of these risky behaviors.<sup>193</sup>

Teens' choices are often characterized by immaturity of thought or

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188. See, e.g., ALASKA STAT. § 23.10.332; CAL. LAB. CODE § 1285; MD. CODE ANN., LAB. & EMPL. § 3-203; N.J. STAT. ANN. § 34:2-21.3; N.C. GEN. STAT. § 95-25.5; PA. STAT. ANN. tit. 43, § 49.

189. IND. CODE ANN. §§ 20-8.1-4-7, 20-8.1-4-15; IOWA CODE §§ 92.2, 92.11; WASH. REV. CODE § 49.12.121. Only a few states impose criminal or civil penalties on parents or guardians who permit their child to work in violation of the state labor law. See, e.g., WIS. STAT. ANN. §§ 103.29, 103.31.

190. See Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEV. REV. 1, 1-2 (1992); Helen E. Garnier & Judith A. Stein, *Values and the Family: Risk and Protective Factors for Adolescent Problem Behaviors*, 30 YOUTH & SOC. 89, 108, 112-13 (1998); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 815-16 (2003).

191. See generally Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763 (1995); see also Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 17-20 (1999); Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 516-17, 524 (1999); Furby & Beyth-Marom, *supra* note 190, at 1-2; Scott & Steinberg, *supra* note 190, at 815.

192. See LAUREN DUBERSTEIN LINDBERT ET AL., *TEEN RISK TAKING: A STATISTICAL PORTRAIT* (Urban Institute 2000), available at <http://www.urban.org>.

193. ROGER J.R. LEVESQUE, *ADOLESCENTS, SEX AND THE LAW* 24 (2002) (quoting JOY G. DRYFOOS, *ADOLESCENTS AT RISK: CURRENT PREVALENCE AND INTERVENTION* (1990)); Cauffman & Steinberg, *supra* note 191, at 1763; Furby & Beyth-Marom, *supra* note 190, at 1-2; Garnier & Stein, *supra* note 190, at 108, 112-13.

action.<sup>194</sup> During adolescence — the transitional stage from childhood to adulthood — emotions, hormones, identity, and the physical body are in a period of change. Research has confirmed that the brain also changes significantly during this period.<sup>195</sup> For both social and biological reasons, teens have great limitations in making mature decisions and understanding the consequences of their actions. Adolescent behavior, and the mental processes that motivate it, are a product of the interface of the neurophysiological processes of the body and interpersonal relationships with family, peers, and the larger community.<sup>196</sup> These limitations persist until the early twenties,<sup>197</sup> which explains why teens have historically had their privileges to contract, marry, vote, drive, and make other significant decisions restricted and subject to adult supervision.<sup>198</sup> Regulations on adolescent employment, however, are notably absent.

### *B. The Anomaly of Juvenile Decision Making in the Labor Market*

Contemporary American law reflects the dominant historical paradigm that minors are legally incompetent to make major life decisions. The law itself provides many restrictions; otherwise, parents are entrusted with the task of making these choices because they will normally act in the child's best interest.<sup>199</sup> Although parental discretion and authority may be restricted in matters affecting the child's welfare, as illustrated by compulsory vaccination laws,<sup>200</sup> in almost all other situations, parents have a "fundamental right . . .

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194. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160-64 (1997).

195. See, e.g., Thomas Paus et al., *Structural Maturation of Neuro Pathways in Children and Adolescents: in Vivo Study*, SCIENCE, Mar. 1999, at 283; Interview by PBS *Frontline* with Jay Giedd, available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain> (last visited Aug. 20, 2004).

196. See generally DANIEL SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* (2001).

197. *Id.*

198. See *infra* Parts IV.B, V.A.2.a-c.

199. "[P]arents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (internal citations, quotations and alterations omitted). See also *Bellotti v. Baird*, 443 U.S. 622, 634 (1978) (recognizing that "the constitutional rights of children cannot be equated with those of adults [because of] the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing").

200. See, e.g., CONN. GEN. STAT. ANN. § 10-204a (West 2002); FLA. STAT. ANN. § 1003.22

to make decisions concerning the care, custody, and control of their children.”<sup>201</sup> This legal doctrine rests on the principle of protecting adolescents against improvident judgments and impaired decisional abilities.<sup>202</sup>

Minimum age requirements govern the right to vote,<sup>203</sup> to marry,<sup>204</sup> and even to attend movies rated NC-17.<sup>205</sup> Children under eighteen may not bring suit in their own names and may disaffirm a contract based on their minority status alone.<sup>206</sup> Without parental authorization, there is normally no informed, competent consent for medical treatment.<sup>207</sup> Decision making regarding transplantation of body organs or tissue is similarly left to parents.<sup>208</sup> Minors in every state may obtain driving privileges only where a parent or custodian

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(West 1998); MINN. STAT. ANN. § 121A.15 (West 2000 & Supp. 2004).

201. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

202. See Robert E. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 219-20 (1967).

203. See, e.g., ILL. CONST. art. III, § 1; IND. CONST. art. II, § 2; KY. CONST. § 145; CAL. ELEC. CODE § 2000 (West 1999); FLA. STAT. ANN. § 97.041; IOWA CODE ANN. § 48A.5 (West 1996).

204. See, e.g., CAL. FAM. CODE § 301 (indicating that the age of consent for marriage is eighteen); see also *Moe v. Dinkins*, 533 F. Supp. 623, 630-31 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982), *cert. denied*, 459 U.S. 827 (1982) (upholding New York law requiring parental consent for marriages of persons between the ages of fourteen and eighteen).

205. See MOTION PICTURE ASSOCIATION OF AMERICA, MOVIE RATINGS, at <http://www.mpa.org/movieratings> (last visited Aug. 22, 2004).

206. See *Sharon v. City of Newton*, 769 N.E.2d 738, 746 (Mass. 2002); *Zelnick v. Adams*, 561 S.E.2d 711, 715 (Va. 2002); RESTATEMENT (SECOND) OF CONTRACTS: INFANTS § 14 (1981); Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 447 (2000).

207. See, e.g., MASS. GEN. LAWS ANN. ch. 112, § 12F (Law. Co-op. 1991); Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075 (1990). There are limited exceptions to the rule that parental consent is needed for medical treatment. See, e.g., CAL. FAM. CODE § 6920; R.I. GEN. LAWS § 23-4.6-1 (1996). The best known exception is the adolescent's decision to terminate a pregnancy. Here, the interests of parents and children may indeed conflict. It is unconstitutional for a state to give parents “an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). These exceptions are not replicated in most medical decision making and may have more to do with conflicting attitudes about the decision itself — abortion — than with views about parental authority or the maturity or autonomy interests of adolescents.

208. Neither the National Organ Transplant Act, 42 U.S.C. §§ 273-274 (2000), nor the Uniform Anatomical Gift Act, 8A U.L.A. §§ 1-7 (1993 & Supp. 2000), nor concomitant state laws, address or allude to adolescent decision making.

sponsors and signs the license application.<sup>209</sup> Alcohol consumption by teens is legally prohibited,<sup>210</sup> and Congress has required states to enact legislation restricting sale and distribution of tobacco products to minors.<sup>211</sup>

In contrast, legal prescriptions governing teens' working and school attendance are vastly different. These rules give adolescents autonomy to make extraordinarily important decisions in those realms with little or no required input from parents and school officials. The teenage workforce is therefore a unique and significant social phenomenon.

### *C. The Youth Workforce*

In 2001, 3.7 million American adolescents between the ages of fifteen and

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209. See, e.g., ALASKA STAT. § 28.15.071 (Michie 2002); COLO. REV. STAT. § 42-2-108 (2004); MISS. CODE ANN. § 63-1-23 (1999 & Supp. 2003). The purpose is to protect public safety and ensure "financial responsibility by individuals who may exercise some control over a minor's actions." *Johnson v. Schlitt*, 565 N.W.2d 305, 307 (Wis. Ct. App. 1997) (citing *Ynocencio v. Fesko*, 338 N.W.2d 461, 464-65 (Wis. 1983)). The adult assumes liability for damages caused by the minor's negligent or intentional conduct while driving. The liability is generally joint and several with the minor. See, e.g., FLA. STAT. ANN. § 322.09 (West 1998). In most states, parents may avoid liability by requesting the motor vehicle department to revoke their child's license. See, e.g., WIS. STAT. ANN. § 343.15 (West 2004).

210. The National Minimum Drinking Age Act, 23 U.S.C. § 158 (2000), requires the Secretary of Transportation to withhold federal highway funds from any state "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." *Id.* § 158(a)(1). Today, the minimum drinking age is twenty-one in all states. See Ken Sternberg, *Alcohol Consumer Must Be 21 Years Old in All States; Concerns Remain About Drunk Driving*, 260 JAMA 2479, 2479 (1988). In 1995, Congress enacted a nationwide "zero tolerance" statute. It encourages states to enact and enforce legislation that "considers an individual under the age of 21 who has a blood alcohol concentration of 0.02 percent or greater while operating a motor vehicle in the State to be driving while intoxicated or driving under the influence of alcohol." 23 U.S.C. § 161(a)(3). States failing to comply with the congressional mandate face losing a portion of their federal highway funds. Many states have similar legislation. See, e.g., ALA. CODE § 28-1-5 (2003); FLA. STAT. ANN. § 322.2616; N.J. STAT. ANN. § 33:1-81 (West 1999).

211. 42 U.S.C. § 300x-26(b)(1) (2000). States must enforce these laws "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of eighteen." *Id.* The minimum age for purchase or use is eighteen. Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *State Laws on Tobacco Control: 1998*, 48 MORBIDITY & MORTALITY WKLY. REP., June 25, 1999, at 21, 26 [hereinafter *State Laws on Tobacco Control*]; see also Jamie Peal Kave, *The Limits of Police Power: State Action to Prevent Youth Cigarette Use After Lorillard v. Reilly*, 53 CASE W. RES. L. REV. 203 (2002). In some states, the minimum age for tobacco purchase or use is even older; Alabama, Alaska, and Utah set the minimum age at nineteen. *State Laws on Tobacco Control*, *supra*, at 26. More than half of the states license retailers that sell tobacco products and provide penalties for licensees that sell to children, including at least fourteen states that provide for license suspension or revocation. *Id.* at 27.

seventeen worked.<sup>212</sup> Large numbers of children under fifteen also worked.<sup>213</sup> One study found employed high school students worked more than twenty hours per week.<sup>214</sup> Boys typically averaged more hours of paid work than girls, especially in the later years of high school.<sup>215</sup> While children from lower income families were less likely to work, when they did work, they tended to work more hours.<sup>216</sup> As might be expected, more children worked during summer months.<sup>217</sup>

In 2001, as throughout the past decade, retail trades, such as department stores, groceries, restaurants, or retail outlets, employed about 60% of all working children.<sup>218</sup> While paying somewhat more than the legally established minimum wage,<sup>219</sup> these jobs typically provide few positive benefits to teenagers. Indeed, youth employment may cause more harm than good.

#### *D. Morbidity & Mortality at Work*

The weakness of child labor laws and their lax enforcement are dramatically illustrated by the physical damage sustained by working adolescents. Youth workers face the same workplace dangers as adults in similar occupations but are far less prepared to confront these hazards.<sup>220</sup> Teens are "congregated in jobs that are characterized by the absence of opportunities for significant promotion," low pay, high turnover, little on-the-job training, wide variation in hours, and few benefits.<sup>221</sup> Jobs with these characteristics are, in general, more dangerous than other jobs.<sup>222</sup> Young

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212. GAO REPORT, *supra* note 9, at 11 fig.1.

213. PROTECTING YOUTH AT WORK, *supra* note 17, at 2.

214. *Id.* at 42-43.

215. *Id.* (summarizing studies finding that 46.5% of high school boys and 38.4% of high school girls worked).

216. Children in families with annual incomes below \$25,000 worked an average of twenty-one hours a week in 2001, five more hours per week than children from higher income families. *Id.*; see also JEYLAN T. MORTIMER, WORK AND GROWING UP IN AMERICA 55-56 (2003).

217. In 2001, 30% of all children ages fifteen to seventeen worked during the summer, compared to 23% who worked in school months. GAO REPORT, *supra* note 9, at 13. These children worked more hours, an average of twenty-one hours per week in summer months, compared to sixteen hours per week in school months. *Id.*

218. *Id.* at 11 fig.2. Cashier is the most common job (16% of fifteen- to seventeen-year-olds), followed by cook, stock handler, bagger, and fast-food server. *Id.*

219. Children's average hourly earnings in 2001 were \$6.36 per hour. *Id.* at 13.

220. See *supra* Part IV.A-B.

221. PROTECTING YOUTH AT WORK, *supra* note 17, at 86.

222. *Id.* at 72-74. Many of the businesses that employ large numbers of adolescents — grocery stores, hospitals, nursing homes, and fast-food establishments — have higher than average injury rates for workers of all ages. GAO REPORT, *supra* note 9, at 28.

workers with limited education and low earning potential increasingly bear the burdens of evening and night hours.<sup>223</sup> Agricultural work is particularly dangerous for young workers as well as adults, yielding fatality rates second only to mining.<sup>224</sup>

Although juvenile employees are protected by general statutes, such as the Occupational Safety & Health Act,<sup>225</sup> they receive neither additional protections nor special allowances for their inexperience.<sup>226</sup> Moreover, thousands of children work in the “underground” economy and other industries, where work is often performed by undocumented workers.<sup>227</sup> Work in the home or in sweat shops often involves conditions and materials that increase the risk of accidents and other safety hazards.<sup>228</sup> Not surprisingly, minors have higher injury rates than adult workers.<sup>229</sup> More than 200,000 young people are hurt on the job annually.<sup>230</sup> In 1999, 58,000 employees aged sixteen to nineteen reported occupational injuries that caused them to miss days from work.<sup>231</sup>

The pattern of work-related fatalities for adolescents has remained the same over the past decade.<sup>232</sup> Forty percent of children killed during the past decade

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223. Daniel S. Hamermesh, *Changing Inequality in Work Injuries and Work Timing*, MONTHLY LAB. REV., Oct. 1999, at 22, 25, 29. Hamermesh asserts that studies focusing solely on earning inequality underestimate the growing inequality in the labor market because nonmonetary benefits in employment (like safety and regular hours) have also become more unequal over the last two decades. *Id.* at 29.

224. Janice Windau et al., *Profile of Work Injuries Incurred by Young Workers*, MONTHLY LAB. REV., June 1999, at 3, 5. During 1992-1997, approximately 40% of fatal injuries for youth workers occurred while performing agricultural work. Most of these deaths were related to transportation, such as tractor accidents. *Id.*

225. 29 U.S.C. §§ 651-678 (2000).

226. Only the standard dealing with exposure to ionizing radiation establishes a lower permissible exposure level for children under eighteen than for adults. 29 C.F.R. § 570.57 (2003).

227. Maria Angelina Soldatenko, *Made in the USA: Latinos, Garment Work and Ethnic Conflict in Los Angeles' Sweatshops*, 13 CULTURAL STUD. 319, 323-24 (1999).

228. *Id.*

229. BUREAU OF LAB. STATISTICS, INCIDENCE RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES FOR ALL WORKERS IN THE PRIVATE SECTOR, BY INDUSTRY tbl. 3-1, available at <http://www.bls.gov/data/sa.htm> (last visited Jan. 31, 2005).

230. NIOSH REPORT, *supra* note 10, at 7. More than 77,000 children suffer injuries serious enough to warrant emergency room treatment. *Id.*

231. BUREAU OF LAB. STATISTICS, OCCUPATIONAL INJURIES & ILLNESSES: COUNTS, RATES & CHARACTERISTICS, 1999 57 (U.S. GPO 2002). Injuries for workers less than sixteen years old are not reported.

232. GAO REPORT, *supra* note 9, at 20. However, from 1992 to 2000, “boys were almost eight times more likely to die as a result of a work-related injury than girls.” *Id.* at 21.



worked in agriculture, primarily crop production.<sup>233</sup> Retail trade and construction accounted for 20% and 14% of all fatalities, respectively.<sup>234</sup>

There is good reason to believe occupational injury statistics for children substantially understate the extent of the problem. Two sources of nationwide data on work-related injuries exist that substantially differ in their estimates: (1) data collected by the Bureau of Labor Statistics (BLS) from employer records,<sup>235</sup> and (2) data collected by the National Institute for Occupational Safety and Health (NIOSH) from emergency room records.<sup>236</sup> These sources differ in their estimates of the number of working children hurt each year, the types of injuries sustained, and trends over time.<sup>237</sup> In 1999, for example, BLS reported 13,000 were hurt on the job, while NIOSH estimated that over 80,000 were injured while working.<sup>238</sup> BLS statistics report only incidents serious enough to require at least one missed day of work; thus, many injuries remain unreported.<sup>239</sup> Moreover, because most children work part-time, they may not have been scheduled to work the day following the injury.<sup>240</sup> BLS does not collect data on many employed children.<sup>241</sup> The NIOSH emergency department data also underreports injuries because children who are hurt may not inform hospital staff that their injuries are work related, may be treated at the doctor's offices rather than in the emergency department, or may not be treated at all.<sup>242</sup>

Adolescent workers age sixteen and older suffer the great majority of work-related injuries.<sup>243</sup> During the 1990s, 84% of youths were injured in the retail trade and service industries — the two industries in which young workers are most likely to be employed.<sup>244</sup> Those working in eating and drinking places, food stores, general merchandise stores, and health services had the largest numbers of injuries.<sup>245</sup> Working teens are also at high risk

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233. *Id.* at 23.

234. *Id.* at 22.

235. *Id.* at 26.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

for highway accidents.<sup>246</sup>

### *E. Negative Academic & Nonacademic Results*

Limited employment — twenty hours or less per week during high school — is associated with reduced high school dropout rates,<sup>247</sup> increased involvement in school activities,<sup>248</sup> and higher grade point averages.<sup>249</sup> In contrast, high-intensity work correlates with numerous negative educational results.<sup>250</sup> For example, truancy and suspension rates increase as a student works more hours.<sup>251</sup> Moreover, the adverse educational effects of early high-intensity employment extend far beyond high school,<sup>252</sup> hindering postsecondary educational achievement.<sup>253</sup>

Adolescents engaged in high-intensity work, particularly those from lower socioeconomic groups,<sup>254</sup> are also at an increased risk for numerous nonacademic detriments.<sup>255</sup> The Institute of Medicine, the research arm of the

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246. Child Labor Coalition, For Teen Workers and Students: Facts about Teen Driving on the Job, available at <http://www.stopchildlabor.org/teensandstudents/drivefac.htm> (last visited Oct. 28, 2004).

247. PROTECTING YOUTH AT WORK, *supra* note 17, at 113-34.

248. Sharon Mihalic & Delbert Elliott, *Short and Long Term Consequences of Adolescent Work*, 28 YOUTH & SOC. 464, 469 (1997).

249. JEYLAN T. MORTIMER & MONICA KIRKPATRICK JOHNSON, ADOLESCENT PART-TIME WORK AND EDUCATIONAL ACHIEVEMENT, THE ADOLESCENT YEARS: SOCIAL INFLUENCES AND EDUCATIONAL CHALLENGES 183-206 (Kathryn Borman & Barbara Schneider eds., 1998); Mark Schoenhals et al., *The Educational and Personal Consequences of Adolescent Employment*, 77 SOC. FORCES 723, 759 (1998).

250. The term "correlation" rather than causation is used here. There is much debate surrounding the casual connection between negative teen behavior and work. Like most social science propositions and data, great controversy surrounds the appropriate variables to be considered and the conclusions to be drawn. Methodology is always an issue.

251. Rothstein, *supra* note 16, at 28; *see also* Myriam L. Baker et al., *Truancy Reduction: Keeping Students in School*, JUV. JUST. BULL., Sept. 2001, at 1 (noting that the number of days a student is absent increases with the number of hours worked); Sheila Heaviside et al., *Violence and Discipline Problems in U.S. Public Schools, 1996-97*, in NAT'L CTR. FOR EDUC. STAT., STATISTICAL ANALYSIS REPORT 14 (1998); Press Release, U.S. Dept. of Educ., *America's Annual Progress Report on Education Provides Mixed Results* (May 31, 2002), available at <http://www.ed.gov/PressReleases/05-2002/05312002.html> [hereinafter *America's Annual Progress Report*].

252. The majority of the students who worked twenty hours per week or less had received some college education by the age of thirty, while those who worked more than twenty hours per week were less likely to have achieved any college education before that age. Rothstein, *supra* note 16, at 31.

253. PROTECTING YOUTH AT WORK, *supra* note 17, at 117.

254. *See generally* John Paul Wright et al., *Working While in School and Delinquent Involvement: Implications for Social Policy*, 43 CRIME & DELINQ. 203 (1997).

255. There is an enormous literature on adolescent risk-taking behavior and its connection

National Academy of Sciences, concluded after a lengthy study that "high intensity work . . . is associated with unhealthy and problem behaviors . . ." <sup>256</sup> Numerous factors contribute to this association of work and negative behaviors, <sup>257</sup> including: (1) most adolescent jobs, especially in fast-food restaurants and retail settings, lack opportunities for adult mentorship because peers often supervise employed youths; (2) absence of adult guardians in the workplace may foster deviance both within and outside the workplace; (3) long hours of employment reduce teens' capacity to engage in "good" leisure, such as sports and extracurricular activities, and accordingly, they may be more attracted to less structured, unsupervised, and potentially deviant activities outside of work. <sup>258</sup> Moreover, high-intensity work correlates with delinquency and substance abuse. <sup>259</sup> Paid jobs also provide income autonomy, which may weaken the informal social controls of family and school and intensify an adolescent's claims to adult status. <sup>260</sup>

#### F. Sexual Harassment

Another danger facing children in the workforce is sexual harassment, which is a form of prohibited sex discrimination. <sup>261</sup> Two types of actionable claims are recognized in the federal courts: (1) "quid pro quo" harassment,

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to employment. See, e.g., PROTECTING YOUTH AT WORK, *supra* note 17, at 2; LAURENCE D. STEINBERG & SANFORD M. DORNBUSCH, NEGATIVE CORRELATES OF PART-TIME EMPLOYMENT DURING ADOLESCENCE: REPLICATION AND ELABORATION (1990); Barbara McMorris & Christopher Uggen, *Alcohol and Employment in the Transition to Adulthood*, 41 J. HEALTH & SOC. BEHAV. 276 (2000); Jeylan T. Mortimer & Monica Kirkpatrick Johnson, *New Perspectives on Adolescent Work and the Transition to Adulthood*, in NEW PERSPECTIVES ON ADOLESCENT RISK BEHAVIOR 425-96 (Richard Jessor ed., 1998); Rothstein, *supra* note 16, at tbl. 3.

256. PROTECTING YOUTH AT WORK, *supra* note 17, at 3.

257. The interrelation between work hours, paid jobs, and good and bad leisure activities is controversial. Some researchers suggest that for many adolescents early problem behaviors are time limited and are generally unlikely to snare young people in long-term problem behaviors. Some of the "bad" leisure activities associated with intensive work hours in high school become more common in young adulthood for youth who work less intensively during adolescence. For example, these young people begin to catch up with their more precocious peers in alcohol use and binge drinking. McMorris & Uggen, *supra* note 255.

258. Greenberger, *supra* note 151, at 21; D. Wayne Osgood, *Having the Time of Their Lives: All Work and No Play?*, in TRANSITIONS TO ADULTHOOD IN A CHANGING ECONOMY (Alan Booth et al. eds., 1999).

259. When adolescents are unable to balance the role of student and worker, for example, their grades suffer and their drinking increases. McMorris & Uggen, *supra* note 255, at 279; Deborah Safron et al., *Part-Time Work and Hurried Adolescence: The Links Among Work Intensity, Social Activities, Health Behaviors, and Substance Use*, 42 J. HEALTH & SOC. BEHAV. 425, 425 (2001).

260. LEVINE, *supra* note 88, at 176.

261. *Meritor Sav. Bank v. Vincent*, 477 U.S. 57, 65-66 (1986).

and (2) “hostile work environment.”<sup>262</sup> To establish either of these claims, youth employees must prove that they were subject to unwelcome sexual conduct that was based on sex.<sup>263</sup> The latter element is usually self-evident. On the other hand, proving that the conduct was unwelcomed is generally difficult and may especially present a major hurdle for young female workers.<sup>264</sup> Conduct is unwelcome if the juvenile did not request or invite it and “regarded the conduct as undesirable or offensive.”<sup>265</sup>

More than one-half of the contemporary teen workforce are adolescent girls.<sup>266</sup> The 1990s brought increased awareness of sexual harassment and its effects on victims. Claims filed with state and federal agencies and in courts increased dramatically.<sup>267</sup> Although harassment may sometimes lead to physical injury, its impact is more often emotional and psychological.<sup>268</sup> Embarrassment, shame, fear, and diminished self-image are common.<sup>269</sup>

Sexual harassment of teen employees is pervasive. In 2002-2003, the Equal Employment Opportunity Commission (EEOC) filed sexual harassment suits involving teen employees against numerous restaurants including Denny’s, Church’s Chicken, and a company running thirty-seven Burger King restaurants.<sup>270</sup> From January to September 2003, the EEOC’s San Francisco

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262. *Id.* at 65. Quid pro quo is the “conditioning of concrete employment benefits on sexual favors.” *Id.* at 62. Hostile work environment claims involve conduct sufficiently severe to interfere with an individual’s job performance, or the creation of an “intimidating, hostile, or offensive working environment.” *Id.* at 65.

263. *Id.* at 68; *see also* 29 C.F.R. § 1604.11(a) (2003) (requiring that sexual conduct be unwelcome to qualify as sexual harassment); 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting discrimination based upon sex).

264. *See, e.g., Meritor Sav. Bank*, 477 U.S. at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’ . . . [T]he question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact . . .”).

265. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

266. According to the Children’s Defense Fund, in January 2004, 33.2% of male teens worked as compared to 34.9% of female teens. Children’s Defense Fund, *Youth Employment Rate Fell to Lowest Level for January in 39 Years*, available at <http://www.childrensdefense.org/pressreleases/040218.asp> (last visited Nov. 13, 2004).

267. In 1992, for example, 10,532 sexual harassment claims were filed with the federal Equal Employment Opportunity Commission (EEOC) and state fair employment agencies. Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-up Call for Women*, 68 BROOK. L. REV. 457, 457 n.3 (2002). By 2000, that number had increased to 15,836. *Id.*

268. MICHELLE A. PALUDI & RICHARD B. BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT* 27-34 (1991).

269. *See, e.g., Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999) (discussing a young sexual harassment victim who engaged in self-destructive and suicidal behavior).

270. Alexei Oreskovic, *Employment Law: The Young and Vulnerable*, CORP. COUNS., Sept. 2003, at 128.

office brought 541 claims on behalf of minors, 99% of which involved sexual harassment.<sup>271</sup>

Young female employees are especially vulnerable to sexual harassment. They almost invariably earn little and are at the bottom of the workplace hierarchy.<sup>272</sup> Adolescents lack the coping mechanisms of adults under stress, especially when social norms promote undesirable behavior.<sup>273</sup> Simply because a young female worker does not object to the conduct should not necessarily mean that she welcomed the behavior.<sup>274</sup> Teens are far more likely to accede to the advances, quit their jobs, or seek help from peers than seek legal recourse or invoke corporate remedies.<sup>275</sup>

Courts have often rejected Title VII claims against employers without sufficient sensitivity to the reasonableness of juveniles' actions because of their developmental stage. For example, in *Reed v. MBNA Marketing Systems, Inc.*,<sup>276</sup> the court found neither the minor employee's age, nor her asserted reasons, including embarrassment and intimidation, excused her delay in reporting harassing comments and actions.<sup>277</sup> In *Madrid v. Amazing Pictures*,<sup>278</sup> a store manager and his replacement consistently made statements regarding a young female worker's anatomy.<sup>279</sup> She was told that if she would lift up her shirt, she would attract more sales.<sup>280</sup> The court dismissed the

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271. *Id.*

272. Many youth workers, for example, are paid a subminimum wage. 29 C.F.R. pt. 520 (2003).

273. See, e.g., HANDBOOK OF ADOLESCENT PSYCHOLOGY (Vincent Van Hasselt & Michael Hersen eds., 1987); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 465-66 (1984); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decision Making*, 37 VILL. L. REV. 1607 (1992).

274. *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (noting that in some cases, a person may be obliged to tell the harasser directly that the conduct is unwelcome, while in others, consistent failure to respond may be sufficient); see also *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (stating that cursing and dirty jokes by female employee does not show she welcomed the harassment).

275. One seventeen-year-old employee finally quit after enduring numerous comments about her physical appearance and being forced to perform oral sex on her supervisor. *Reed v. MBNA Mktg. Sys.*, 231 F. Supp. 2d 363, 367 (D. Me. 2002). She reapplied for employment with the company the following spring, was assigned to work under the same supervisor, and only then reported the sexual harassment to the company. *Id.* at 368. The company's investigation revealed that the supervisor had also engaged in sexual relations with another underage employee. *Id.*

276. 231 F. Supp. 2d 363 (D. Me. 2002).

277. Without discussing the plaintiff's age or vulnerability, the Court refused to "excuse Plaintiff from following the procedures adopted for her protection." *Id.* at 375.

278. No. Civ.99-1565, 2001 WL 837922 (D. Minn. July 23, 2001).

279. *Id.* at \*3.

280. *Id.* at \*4.

claim, finding she unreasonably failed to take advantage of preventative or corrective opportunities.<sup>281</sup> In cases like these, the courts failed to consider sufficiently not only the relationship of youthful workers to supervisors, but also teens' developmental phase. At least one court has more appropriately acknowledged that "[a] reasonable person is likely to feel particularly helpless and humiliated when harassed by a supervisor three times her age and the highest in command at her work location."<sup>282</sup> Courts should also recognize that the effect of harassment is likely to be more severe in the case of juveniles than adults; depression, academic deficiencies, and emotional and psychological problems often result.<sup>283</sup>

Courts should provide stronger protection to young employees. In these harassment cases, the fact that the advances were welcomed is a legal defense for the defendant,<sup>284</sup> but there should be a strong presumption that sexual conduct between an adult worker — particularly a supervisor — and a juvenile employee is not consensual. A more realistic approach is illustrated in *EEOC v. R&R Ventures*,<sup>285</sup> where the court found the conduct of a Taco Bell manager sufficiently severe to create a hostile working environment.<sup>286</sup> The manager made sexual jokes and discussed sexual experiences and positions with a fifteen-year-old employee.<sup>287</sup> He also commented on her breasts and buttocks, causing her to develop an eating disorder to avoid drawing attention to her body.<sup>288</sup> The court declared:

Here the severity of [the manager's] sexual misconduct was compounded by the context in which it took place. Throughout his campaign of torment, Wheeler was an adult male in a supervisory position over young women barely half his age. And he is alleged to have engaged in a systematic effort to cripple the self-esteem of the teenagers who assisted him at the store.<sup>289</sup>

*EEOC v. R&R Ventures* sets a standard to protect minors from exploitative sexual encounters, although more regulation is obviously necessary to ensure consistent application of sexual harassment laws in youth employment lawsuits.

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281. *Id.* at \*11.

282. *Ibrahim v. Holidays Inn, Inc.*, No. 95 C 4316, 1996 WL 199743, at \*8 (N.D. Ill. Apr. 23, 1996).

283. *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 (7th Cir. 1997) (noting that "harassment has a greater and longer lasting impact on its younger victims").

284. *Meritor Sav. Bank v. Vincent*, 477 U.S. 57, 68 (1986).

285. 244 F.3d 334 (D. Md. 2001).

286. *Id.* at 340.

287. *Id.* at 337.

288. *Id.*

289. *Id.* at 340.

### V. *The Case for Change*

#### A. *The Inadequacy of the Current Legal Regime*

##### 1. *Federal Law*

###### a) *Statutory Failings*

While the FLSA provides some regulation of child labor, it is far from comprehensive. Of necessity, the Act applies only to goods that move in interstate commerce.<sup>290</sup> Accordingly, many smaller businesses, door-to-door sales, and other economic activities in which children are employed are not covered.<sup>291</sup> In many instances, this work — selling newspapers or other items locally — is relatively innocuous. But often children are recruited for sales crews that travel considerable distances from home and extend overnight or beyond.<sup>292</sup> A series of exemptions exclude large numbers of children from the Act even where the business activities affect interstate commerce.<sup>293</sup> The FLSA also distinguishes between farm and nonfarm employment, greatly disadvantaging children in agriculture.<sup>294</sup>

Federal law has failed to keep pace with the enormous increase in the number of children working and the variety of jobs they perform. While the FLSA has been amended numerous times since its enactment in 1938,<sup>295</sup> its major provisions have remained substantially unchanged.<sup>296</sup> It does not

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290. To be included, employers must meet either (1) an “enterprise” test; or (2) an “employer” test. 29 U.S.C. § 203(s) (2000). The “enterprise” test depends on the company’s gross volume of sales; currently, minimum annual sales revenue of \$500,000 is required. *Id.* § 203(s)(ii). Under the “employer” test, there must be a showing of significant impact by either the business or the affected employee on interstate commerce. *Id.* § 203(s)(i).

291. Many smaller businesses would likely be under the \$500,000 annual sales requirement of 29 U.S.C. § 203(s).

292. The Traveling Sales Crew Protection Act, S. 1989, 106th Cong. § 101(e) (1999), sought to amend the state labor laws to prohibit any kind of door-to-door sales or related work that requires employees under eighteen to remain away from home for more than twenty-four hours. No action was ever taken on this measure.

293. For example, children employed by a parent, in street trades, etc., are not covered. 29 U.S.C. § 213 (2000).

294. *See infra* Part V.A.1.b (discussing youth labor in agriculture).

295. *See* Fair Labor Standards Act (FLSA) of 1949, 63 Stat. 910; FLSA of 1955, 69 Stat. 711; FLSA of 1961, 75 Stat. 65; FLSA of 1966, 80 Stat. 830; FLSA of 1974, 88 Stat. 55; FLSA of 1977, 91 Stat. 1245; FLSA of 1985, 99 Stat. 787; FLSA of 1989, 103 Stat. 938.

296. *See generally* Willis J. Norlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715-24 (1988) (noting that the amendments have simply raised the minimum wage rate and limited the power of the Act itself).

require that working youths have a work permit or certificate<sup>297</sup> and only restricts the hours of employment for minors who are under sixteen.<sup>298</sup> The DOL has no statutory authority to regulate the number of hours or the time sixteen- and seventeen-year-olds may work.<sup>299</sup> These adolescents may be compelled to work long hours and late into the night, conditions almost certain to impair their studies.<sup>300</sup> This situation is even more egregious given that many of these working teens are already doing poorly in school.<sup>301</sup> Many choose work over their studies, despite the critical role education plays in achieving economic and other success in society.<sup>302</sup>

While federal labor law prohibits the employment of sixteen- and seventeen-year-olds in occupations found "hazardous or detrimental" to their health and well-being, these designations have not been changed since 1975 despite new technologies, changing work conditions, and a vastly different work force.<sup>303</sup> Moreover, in jobs deemed "hazardous" by the DOL, if employers fall outside the jurisdiction of the FLSA, youth workers receive no protection from federal law.<sup>304</sup> Despite the large number of workplace accidents, federal law does not require youth workers to be provided with safety training before starting a job. Employed youths are not required to have

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297. The DOL, however, accepts state-issued work permits and certificates as proof of age. If a state does not issue permits or certificates, the DOL will issue age certificates on request. U.S. GAO, WORK PERMIT AND DEATH AND INJURY REPORTING SYSTEMS IN SELECTED STATES 2 (1992).

298. *Schmidt v. Reich*, 835 F. Supp. 435, 443 (N.D. Ill. 1993).

299. *Id.* The FLSA sets out controls on these matters for fourteen- and fifteen-year-olds. 29 U.S.C. § 203(l) (2000).

300. The court in *Schmidt* declared:

Although we share the plaintiff's concern about the plight of full-time students compelled to labor late into the night and to work hours almost certain to impair their studies, and while we recognize that education plays a key role in achieving success in today's society, the bounds of our authority are clear. Any change must, as [Labor] Secretary Martin observed, come from the legislature.

*Schmidt*, 835 F. Supp. at 444.

301. LEVINE, *supra* note 88, at 176-80 (summarizing numerous studies demonstrating poor academic performance).

302. See, e.g., *Schmidt*, 835 F. Supp. at 437-38.

303. See, e.g., 29 C.F.R. § 570.120 (2003). "The Department of Labor should undertake periodic reviews of its hazardous orders in order to eliminate outdated orders, strengthen inadequate orders, and develop additional orders to address new and emerging technologies and working conditions." PROTECTING YOUTH AT WORK, *supra* note 17, at 228. After more than twenty-eight years, the DOL presently is considering such changes. *Id.* at 168-69.

304. For example, enterprises whose gross volume sales are less than \$500,000 annually are exempted from the "oppressive child labor" provision of the FLSA. 29 U.S.C. §§ 203(s)(1)(A)(ii), 212(c).



adult supervision. Notably, 41% of workplace deaths occur while an adolescent is doing work prohibited by federal child labor laws.<sup>305</sup>

In addition, the FLSA provides no federal remedy for youths injured while working in prohibited jobs.<sup>306</sup> In *Breitwieser v. KMS Industries, Inc.*,<sup>307</sup> for example, a sixteen-year-old boy was crushed to death by the forklift he was operating.<sup>308</sup> The Secretary of Labor had previously declared the operation of forklifts a “particularly hazardous” occupation.<sup>309</sup> Under the Georgia Worker’s Compensation statute in effect at the time,<sup>310</sup> the amount of recovery given to beneficiaries of deceased workers with no dependents was \$750.<sup>311</sup> The Fifth Circuit Court of Appeals refused to imply a cause of action from the FLSA, despite the obvious inadequacy of the state worker compensation award.<sup>312</sup> The court found that the Act already contained a “comprehensive enforcement scheme.”<sup>313</sup> Consequently, the FLSA provided no money damages for death.<sup>314</sup> Most young workers, of course, have no spouse or dependents and thus the death of a minor worker often provides minimal compensation to the parent.<sup>315</sup> Even if willful misconduct or gross negligence by the employer results in injury, federal law provides no remedy for the victim.<sup>316</sup>

#### *b) Child Labor in American Agriculture*

The original FLSA excluded agriculture to protect “family farms,” where child labor was necessary.<sup>317</sup> Today, the agriculture industry is big business,<sup>318</sup>

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305. Dawn N. Castillo et al., *Occupational Injury Deaths of 16 and 17 Year Olds in the United States*, 84 AM. J. PUB. HEALTH 646, 648 (1994).

306. See, e.g., *Henderson v. Baer*, 968 P.2d 144, 147 (Colo. Ct. App. 1998) (refusing to infer private, civil remedy for violation of FLSA); *Kube v. Kube*, 227 N.W.2d 860, 861 (Neb. 1975) (same).

307. 467 F.2d. 1391 (5th Cir. 1972).

308. *Id.* at 1392.

309. See 29 C.F.R. §§ 570.1(c), 570.2(a) (1996).

310. GA. CODE ANN. § 114-103 (1972).

311. *Breitwieser*, 467 F.2d at 1394.

312. *Id.*

313. *Id.* at 1392.

314. *Id.* at 1394.

315. Arthur J. Amchan, *Callous Disregard for Employee Safety: The Exclusivity of the Worker’s Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 683-84 (1983).

316. *Id.*

317. Fair Labor Standards Act of 1938, ch. 675, 52 Stat. 1060. For a detailed description of the exclusion of agricultural laborers from the FLSA, see Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649 (1989). See also 29 U.S.C. § 213(a)(6)(B) (2000) (exempting any employee employed in agriculture “if such employee is the parent, spouse, child, or other member of his

and migrant farmworkers are among the poorest people in the country.<sup>319</sup> Hundreds of thousands of youth,<sup>320</sup> often at very young ages, work legally in agriculture.<sup>321</sup> These youth farmworkers work long hours, before and after school, perform arduous physical labor, and risk illness, exposure to pesticides, serious injury, and permanent disability.<sup>322</sup> Of work-related deaths in employees under eighteen, 41% occurred in agriculture and a staggering 20% were child farmworkers thirteen years of age or younger.<sup>323</sup>

Today, most of the FLSA's modest restrictions exempt children working in agriculture.<sup>324</sup> No maximum hour restrictions are imposed.<sup>325</sup> Regardless of the number of hours a child works in agriculture, the employer need not pay overtime.<sup>326</sup> As long as the farm work is merely "hazardous" and not "*particularly hazardous*," youths over sixteen may perform the work.<sup>327</sup> Fourteen-year-olds are permitted to work in agriculture any time outside of school hours.<sup>328</sup> The FLSA allows children ages twelve to thirteen to work

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employer's immediate family").

318. See, e.g., *The Business of America*, in U.S. INFORMATION AGENCY, PORTRAIT OF THE USA ch. 5 (Sept. 1997), available at <http://usinfo.state.gov/usa/infousa/facts/factover/ch5.htm>. California's agriculture industry, for example, produced almost \$26 billion in cash receipts in 2001, making it the most productive state; however even the state with the lowest amount of agricultural cash receipts, Rhode Island, brought in \$47 million. U.S. DEP'T OF AGRIC., 2002-2003 STATISTICAL HIGHLIGHTS OF U.S. AGRICULTURE, available at <http://www.usda.gov/nass/pubs/stathigh/2003/econindex.htm> (last visited Nov. 29, 2004). The total agricultural cash receipts in the United States in 2001 totaled \$203 billion. *Id.*

319. See generally Jean M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455 (1995). Further, migrant farmworker families often "have no homes or live in overcrowded and unsanitary housing. . . . Their children, who often work in the fields, are exposed to the same poor conditions and may be more susceptible to health risks." U.S. GAO, HIRED FARM WORKERS: HEALTH AND WELLBEING AT RISK 2, 3, 8 (1992) [hereinafter HIRED FARM WORKERS]. The average family earns less than \$10,000 per year. 145 CONG. REC. E2303-02 (daily ed. Nov. 8, 1999) (statement of Rep. Lantos).

320. Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 498 (1998) (estimating 800,000 to 1.5 million children).

321. 145 CONG. REC. E2303-02 (daily ed. Nov. 8, 1999) (statement of Rep. Lantos); see also *Bills to Ban Oppressive Child Labor in Agriculture and for Other Purposes: Hearing on H.R. 10499 and H.R. 1597 Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor*, 92nd Cong. 73 (1971) (statement of Robert McMillen, AFL-CIO).

322. See generally LEE TUCKER, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS (2000), available at <http://www.hrw.org/reports/2000/frmwkr>.

323. GAO REPORT, *supra* note 9, at 23.

324. See 29 U.S.C. §§ 213(a)(6), 213(b)(12) (2000).

325. See *id.* § 213 (b)(12).

326. *Id.* § 213(a).

327. *Id.* § 213(c)(2) (emphasis added).

328. The FLSA child labor restrictions do not apply to employees "fourteen years of age or

with parental consent or if their parents are employed on the same farm,<sup>329</sup> or if working for a member of their immediate family.<sup>330</sup> Migrant-worker parents are often classified as independent contractors; thus children are not considered an employee of the grower-employer and are not protected by the FLSA. "To characterize the migrant worker as an independent business person contracting freely with the grower is an extremely inaccurate portrayal . . . [C]haracterizing migrant child workers as children 'helping out' on the family farm or in an independent business operation is pure fiction."<sup>331</sup> The life expectancy of a child agricultural worker is forty-nine years, and 45% of these workers drop out of school.<sup>332</sup>

Challenging a grower's practice of employing children requires a court or an administrative law judge (ALJ) to determine whether the child is an "employee" under the FLSA and whether the child's parent is an independent contractor.<sup>333</sup> The court or ALJ makes this determination on a case-by-case basis considering the circumstances of each situation, which results in uncertainty and inconsistency.<sup>334</sup> Lengthy litigation is required to address an immediate problem.<sup>335</sup>

Because many farmworkers' pay is based upon the amount of produce harvested,<sup>336</sup> young children are used frequently to supplement the family's income even when absence from school, exposure to pesticides, and exposure to dangerous farm equipment results. The federal Environmental Protection

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older." *Id.* § 213(c)(1)(C).

329. FLSA exempts child labor restrictions for employees under the age of twelve who are employed (1) by their parents, (2) with their parents' consent, or (3) on the same farm as their parents. *Id.* § 213(c)(1)(A)-(B). A child of twelve or thirteen needs only the consent of a parent to work on a farm, even if working conditions are "hazardous" or "oppressive"; for children over fourteen, parental consent is unnecessary. *Id.* § 213(c)(1)(C).

330. *Id.* § 213(a)(6)(B). For example, the head of a family may contract with a farm owner to harvest a particular field and pay the family a portion of the profits from that field. *See Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984).

331. Glader, *supra* note 319, at 1466. In fact, a farmworker labeled an "independent contractor" may employ his children, no matter how young or how dangerous the working conditions. *Id.* at 1466-67.

332. Celeste Corlett, *Impact of the 2000 Child Labor Treaty on U.S. Child Laborers*, 19 ARIZ J. INT'L & COMP. L. 713, 713 (2002).

333. Glader, *supra* note 319, at 1467-69.

334. *Id.* at 1468; *see also Donovan*, 736 F.2d at 1116.

335. In 1995, for example, the DOL investigated and filed suit against a grower, Merle Elderkin. Peter Gage, a ten-year-old, was seriously injured after his clothing was caught in the machinery of a feeder wagon at 9:30 p.m. on Elderkin's farm. *Dep't of Labor v. Elderkin*, No. 95-CLA-31, 2000 WL 960261, at \*6 (DOL Adm. Rev. Bd. 2000). The defendant claimed that Peter was working as an independent contractor or as the employee of his stepfather. *Id.* Resolution of the case took over five years. *Id.* at \*1.

336. *See, e.g., Donovan*, 736 F.2d at 1116.

Agency, which regulates pesticides and its uses, has estimated that hired farmworkers suffer up to 300,000 acute illnesses and injuries from exposure each year.<sup>337</sup> A 1990 survey of Mexican-American children working on New York farms reported that “almost half had worked in fields still wet with pesticides and over a third had themselves been sprayed.”<sup>338</sup>

### c) Enforcement Deficiencies

The FLSA’s child labor enforcement provisions are weak. Although the FLSA provides for criminal penalties, a “one free bite” rule is in effect; thus, employers may be jailed only if they have a prior conviction for breaking child labor laws.<sup>339</sup> Between 1988 and 2004, no employer faced criminal prosecution.<sup>340</sup> In stark contrast to the minimum-wage and maximum-hour provisions of the FLSA and most civil rights statutes, federal law gives no private right of action for violation of the child labor provisions and makes no provision for attorney fees.<sup>341</sup> The most affected parties — aggrieved minor employees and their parents — are thus unable to sue as “private attorneys-general.”

Enforcement is thus left entirely to administrative processes. There are fewer than one thousand federal wage-and-hour compliance officers to enforce the FLSA<sup>342</sup> and numerous other statutes. In comparison, the Fish and

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337. *Harvesting Heartache: Child Labor in the Agricultural Sector*, OCC. HAZARDS, Nov. 1995, at 25.

338. UNICEF, *Exploding the Myths about Child Labour*, STATE OF THE WORLD’S CHILDREN (1997), at <http://www.unicef.org/sowc97/news2.htm>.

339. 29 U.S.C. § 216(a) (2000).

340. *USA Today* reviewed federal enforcement of child labor laws by examining documents obtained under the Freedom of Information Act as well as reports and articles from other sources and found no criminal prosecution. Stephanie Armour, *Child-Labor Laws Not Tough Enough, Advocates Say*, USA TODAY, Dec. 23, 1998, at 2B. A Westlaw search also revealed no criminal prosecutions from 1994-2004.

341. 29 U.S.C. § 216 explicitly provides adult employees with a cause of action, including a class action, for unpaid minimum wages and overtime compensation plus liquidated damages. Attorney’s fees and costs are also authorized, thus encouraging lawyers to handle these cases. See 29 U.S.C. § 211. This pattern is repeated in numerous other civil rights statutes. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 626(b); Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k) (2000); Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988.

342. GAO REPORT, *supra* note 9, at 38. The Children’s Act for Responsible Employment of 2001, H.R. 2239, 107th Cong. § 6(1), would have added “at least 100 additional inspectors within the Wage and Hour Division . . . for the principal purpose of enforcing compliance with child labor laws.” *Id.* It also would have provided a 10% increase in the budget of the Solicitor of Labor for prosecution of child labor violations. *Id.* § 6(2). The bill died in committee.

Wildlife Service has 12,000 inspectors.<sup>343</sup> The DOL's resources have declined by 23% in the past twelve years,<sup>344</sup> despite the growth in the workforce.<sup>345</sup> Even when inspections revealed violations, 43% of businesses charged with FLSA violations had their fines reduced.<sup>346</sup> The Government Accounting Office (GAO) found DOL district officials "sometimes reduced the penalties for child labor violations or did not assess any penalties."<sup>347</sup> The GAO Report also criticized the Wage and Hour Division (WHD) for failing to provide adequate training to its regional and district offices on how to obtain information from the agency's database to use in targeting child labor compliance efforts.<sup>348</sup>

The DOL consistently understates the problems of child labor. The DOL has estimated fewer than 10,000 children working in violation of federal laws in every year since 1994.<sup>349</sup> In a recent, thorough study, Professors Kruse and Mahony, using the Current Population Survey (CPS) and other sources, estimated that businesses employ 154,000 children in violation of federal or state labor laws in an average week; 301,000 children are illegally working during a year.<sup>350</sup> Most children working in violation of the FLSA are under sixteen years old and work an average of ten hours more than allowed by law.<sup>351</sup> They also work in prohibited industries and occupations.<sup>352</sup> In 2001,

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343. LEVINE, *supra* note 88, at 6.

344. A decade ago, the National Safe Workplace Institute, a nonprofit group funded by foundations and corporations, estimated that "a business can expect a visit by a federal labor inspector once every 50 years." Bryan Dumaine, *Illegal Child Labor Comes Back*, FORTUNE, Apr. 5, 1993, at 86.

345. The number of people in the workforce in 1990 was approximately 189,164,000 as compared to 207,763,000 in 1999. *Labor Force, Employment, and Earnings*, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000 403 tbl.643, available at <http://www.census.gov/prod/2001pubs/statab/sec13.pdf>.

346. Stephanie Armour, *Danger: Underage Teen Workers Face Risks on the Job, But Does the Government Do Enough to Protect Them?*, USA TODAY, Dec. 23, 1998, at 1B.

347. GAO REPORT, *supra* note 9, at 45.

348. *Id.* at 45-46.

349. *Id.* at 37.

350. Douglas Kruse & Douglas Mahoney, *Illegal Child Labor in the U.S.: Prevalence and Characteristics*, 54 INDUS. & LAB. REL. REV. 17, 17 (2000).

351. GAO REPORT, *supra* note 9, at 15-16. Professors Kruse and Mahoney found that 10.7% of working fifteen-year-olds were working in violation of child labor laws. Kruse & Mahoney, *supra* note 350, at 22. They estimate 110 million illegal hours worked by children every year. *Id.* at 21. These statistics are based on data collected by the CPS, which tends to undercount rather than overcount illegally employed children. *Id.* at 19-20. Their report includes data from National Longitudinal Surveys on Youth and Adolescent Health and takes into account differences between summer months and the school year. *Id.* at 21.

352. For example, in 2001, although only 3% of all children worked in manufacturing, this industry accounted for 14% of illegally employed children. GAO REPORT, *supra* note 9, at 12.

as in the past, “minority children and children from families with annual incomes below \$25,000 were more likely than other children to work illegally.”<sup>353</sup> Teens unlawfully employed in hazardous jobs earn, on average, \$1.38 less per hour than lawful workers in the same occupations.<sup>354</sup> When combined with savings derived from employing youths for excessive hours, illegal child labor results in employer cost savings of roughly \$136 million per year.<sup>355</sup>

Since 1990, the number of enforcement actions, penalties assessed, and number of children found illegally employed by the DOL have all dropped significantly.<sup>356</sup> In 1990, the DOL found 5889 child labor law violations involving 39,790 illegally employed children;<sup>357</sup> \$8.5 million was assessed in penalties.<sup>358</sup> In 2003, only 1648 cases were initiated, 7228 minors were found unlawfully employed, and less than \$5 million was assessed in penalties.<sup>359</sup> The fines imposed have been small, with the average penalty in 2001 being just over \$3000.<sup>360</sup> Even these figures may be exaggerated because the DOL often settles cases for much less than what was assessed.<sup>361</sup> The total fines imposed for child labor violations in 2001 were one-half the amount assessed in 1991.<sup>362</sup>

Lack of federal enforcement is particularly egregious in the agricultural industry. The statistics are themselves instructive. In 1990, the DOL reported only 138 cases of child labor violations.<sup>363</sup> In 1993, the DOL reported fifty-four cases with violations involving 146 farm children,<sup>364</sup> and in 1997, it

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Similarly, although only 3% of all working children worked in construction, they accounted for 16% of all illegally employed children. *Id.* at 16.

353. *Id.* at 10.

354. Kruse & Mahoney, *supra* note 350, at 32.

355. *Id.* at 33.

356. GAO REPORT, *supra* note 9, at 37.

357. *Id.*

358. *Id.*

359. WAGE & HOUR DIV. (WHD), DOL, 2003 STATISTICS FACT SHEET, at <http://www.dol.gov/esa/whd/statistics/200318.htm> (last visited Nov. 29, 2004).

360. GAO REPORT, *supra* note 9, at 37.

361. Stephanie Armour, *Child Labor Violators Fines Often Slashed*, USA TODAY, Dec. 23, 1998, at 1A.

362. In 2001, WHD fines for child labor violations totaled \$6.7 million compared to \$12.7 million in 1991. *Id.*

363. U.S. DOL, REPORT ON THE YOUTH LABOR FORCE 12 (Nov. 2000), at <http://stats.bls.gov/opub/rylf/rylfhome.htm>.

364. U.S. GAO, CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES 40 (1998), at <http://www.gao.gov/archive/1998/he98193.pdf>.

reported fourteen cases with violations involving twenty-two children.<sup>365</sup> In contrast, others estimate over a million child labor violations and 100,000 minors working illegally on farms each year.<sup>366</sup>

## 2. State Laws

### a) Child Labor Laws

Working children typically fare no better under current state child labor laws, which generally track the FLSA. State statutes, however, apply in the many instances when the FLSA is silent or inapplicable to a particular employment situation.<sup>367</sup> The major issues covered by state child labor laws include: (1) the type of work children may perform, (2) minimum age, (3) number of hours and time of work, (4) involvement in decision making by responsible adults, (5) legal remedies after injury, and (6) administrative enforcement of existing rules.

Federal law is generally more stringent than state law in defining “hazardous work,” which is barred for juveniles.<sup>368</sup> More than half of the states define “hazardous” work less restrictively than federal regulations.<sup>369</sup>

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365. *Id.*

366. HIRED FARM WORKERS, *supra* note 319, at 22 (citing an estimate by the National Child Labor Committee).

367. Where there is a conflict between state and federal laws, the stricter standard applies. 29 U.S.C. § 218(a) (2000).

368. The *Code of Federal Regulations* explicitly defines hazardous occupations. *See, e.g.*, 29 C.F.R. § 570.51 (2004) (explosive manufacturers); *id.* § 570.52 (vehicle drivers); *id.* § 570.53 (coal mining); *id.* § 570.54 (logging and mill operations); *id.* § 570.55 (power-driven woodworking); *id.* § 570.57 (places with radioactive substances); *id.* § 570.58 (power-driver hoists); *id.* § 570.59 (metal punch); *id.* § 570.60 (mining other than coal); *id.* § 570.61 (meat packing or processing); *id.* § 570.62 (bakery); *id.* § 570.63 (paper processing); *id.* § 570.64 (manufacturing of tile, bricks, etc.); *id.* § 570.65 (circular saw, band saws, and guillotine shears); *id.* § 570.66 (wrecking and demolition); *id.* § 570.67 (roofing); *id.* § 570.68 (excavation).

369. *See, e.g.*, ALASKA STAT. § 23.10.350 (Michie 2002); ARK. CODE ANN. § 11-6-107 (Michie 1987); CONN. GEN. STAT. ANN. § 31-24 (West 2002); GA. CODE ANN. § 39-2-1 (Harrison 1987); HAW. REV. STAT. § 390-2 (1993 & Supp. 2003); IDAHO CODE § 44-1301 (Michie 2001); KY. REV. STAT. ANN. § 339.230 (Banks-Baldwin 1999); MICH. COMP. LAWS ANN. § 409.103 (West 1997); MINN. STAT. ANN. § 181A.04 (West 2000 & Supp. 2004); MISS. CODE ANN. § 71-1-17 (1999); MO. ANN. STAT. § 294.040 (West 2000 & Supp. 2004); MONT. CODE ANN. § 41-2-107 (1999); NEB. REV. STAT. § 48-313 (2003); NEV. REV. STAT. § 609.190 (2003); N.H. REV. STAT. ANN. § 276-A:4 (2001); N.M. STAT. ANN. § 50-6-5 (Michie 2003); OHIO REV. CODE ANN. § 4109.05 (Anderson 2002); 40 OKLA. STAT. § 73 (2001); OR. REV. STAT. § 653.320 (2003); R.I. GEN. LAWS § 28-3-9 (1996); S.C. CODE ANN. § 41-13-20 (Law.

Seventeen states either exempt agricultural employment entirely or do not identify it as a covered industry under the state's child labor laws.<sup>370</sup> Another eight jurisdictions place only the minimal restrictions on agricultural employment used by federal law.<sup>371</sup>

State limits on the time children spend working are minimal. In almost all states, the number of working hours permitted depends on the juvenile's age and whether school is in session. More restrictions are placed on minors under sixteen, but only nineteen jurisdictions limit minors under this age to three hours a day of work during the school term.<sup>372</sup> Remarkably, eighteen states allow minors under sixteen to work forty hours or more per week while attending school.<sup>373</sup> Connecticut is the only state that completely bans work for children under age sixteen during the school term.<sup>374</sup> Some states impose limits on the amount of combined school and work hours in a day or week.<sup>375</sup> Thirty states prohibit night work after 7:00 p.m.,<sup>376</sup> while thirty-three do not

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Co-op. 2004); S.D. CODIFIED LAWS § 60-12-3 (Michie 2002 & Supp. 2003); UTAH CODE ANN. § 34-23-201 (2000); WASH. REV. CODE § 49.12.121 (1997); WIS. STAT. ANN. § 103.65 (West 2004); WYO. STAT. ANN. § 27-6-112 (Michie 2003).

370. Alabama, Delaware (nonhazardous employment), Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska (work in beet fields), North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, West Virginia, and Wyoming.

371. New Jersey, New York, Ohio, South Carolina, Vermont, Virginia, Washington, and Wisconsin.

372. See ALA. CODE § 25-8-36 (2003); ARIZ. REV. STAT. ANN. § 23-233 (West 2002); CAL. LAB. CODE § 1391 (West 1993); FLA. STAT. ANN. § 450.081 (West 1998); IND. CODE ANN. § 20-8.1-4-20 (Michie Supp. 2004); LA. REV. STAT. ANN. § 23-214 (West 2001); ME. REV. STAT. ANN. tit. 26, § 774 (West Supp. 2003); MO. ANN. STAT. § 294.030; N.H. REV. STAT. ANN. § 276-A:4; N.J. STAT. ANN. § 34:2-21.3 (West 1999); N.Y. LAB. LAW § 142 (McKinney 2001); N.C. GEN. STAT. § 95-25.5 (2002); N.D. CENT. CODE § 34-07-15 (2003); OHIO REV. CODE ANN. § 4109.07; 40 OKLA. STAT. § 75; S.C. CODE ANN. § 41-13-5; TENN. CODE ANN. § 50-5-104 (2002); VT. STAT. ANN. tit. 21, § 434 (1989); W. VA. CODE ANN. § 21-6-7 (Michie 2003).

373. See ARK. CODE ANN. § 11-6-110; COLO. REV. STAT. § 8-12-105 (2004); GA. CODE ANN. § 39-2-7; HAW. REV. STAT. § 390-2; IDAHO CODE § 44-1303; KAN. STAT. ANN. § 38-603 (2002); MASS. GEN. LAWS ANN. ch. 149, § 65 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. § 409.110; MINN. STAT. ANN. § 181A.04; MISS. CODE ANN. § 71-1-21; MO. ANN. STAT. § 294.030; MONT. CODE ANN. § 41-2-115; NEB. REV. STAT. § 48-310; NEV. REV. STAT. § 609.240; N.M. STAT. ANN. § 50-6-3; R.I. GEN. LAWS § 28-3-11; TEX. LAB. CODE ANN. § 1.013 (Vernon 1996); WYO. STAT. ANN. § 27-6-110.

374. CONN. GEN. STAT. ANN. § 31-23 (West 2002).

375. Maryland and Michigan impose these limits on sixteen- and seventeen-year-olds. See MD. CODE ANN., LAB. & EMPL. § 3-210 (2004); MICH. COMP. LAWS ANN. § 409.111. Alaska, Hawaii, and Michigan impose these limits on sixteen-year-olds. ALASKA STAT. § 23.10.340 (Michie 2002); HAW. REV. STAT. § 390-2; MICH. COMP. LAWS ANN. § 409.110.

376. See ALA. CODE § 25-8-33; ARK. CODE ANN. § 11-6-108 (Michie 1987); CAL. LAB. CODE § 1391; CONN. GEN. STAT. ANN. § 31-23; DEL. CODE ANN. tit. 19, § 506 (2003); FLA. STAT. ANN. § 450.081; HAW. REV. STAT. § 390-2; 820 ILL. COMP. STAT. ANN. 205/3 (West



allow work before 7:00 a.m.<sup>377</sup>

Federal law requires no consent from parents or school authorities for children to work.<sup>378</sup> State law, although varied, follows this pattern of giving parents little legal control over the child's decision to work. Only nineteen states require parental consent for children under sixteen years old to work.<sup>379</sup> Only twelve require consent by parents for sixteen- and seventeen-year-olds to work.<sup>380</sup>

Under the FLSA, no limitations exist on hours worked by sixteen- and seventeen-year-olds, and many states' laws are similar. Thirty-one states

Supp. 2004); IND. CODE ANN. § 20-8.1-4-20 (Michie 1997); IOWA CODE ANN. § 92.7 (West 1996); LA. REV. STAT. ANN. § 23-215; ME. REV. STAT. ANN. tit. 26, § 774; MASS. GEN. LAWS ANN. ch. 149, § 65; MISS. CODE ANN. § 71-1-21; MO. ANN. STAT. § 294.030; MONT. CODE ANN. § 41-2-115; N.J. STAT. ANN. § 34:2-21.3; N.Y. LAB. LAWS § 142; N.C. GEN. STAT. § 95-25.5; N.D. CENT. CODE § 34-07-15; OHIO REV. CODE ANN. § 4109.07; 40 OKLA. STAT. § 75; OR. REV. STAT. § 653.315 (2003); PA. STAT. ANN. tit. 43, § 46 (West 1992); R.I. GEN. LAWS § 28-3-2; S.C. CODE ANN. § 41-13-5; TENN. CODE ANN. § 50-5-104; VT. STAT. ANN. tit. 21, § 434; WASH. REV. CODE § 49.12.121 (1997); W. VA. CODE ANN. § 21-6-7.

377. ALA. CODE § 25-8-36; CAL. LAB. CODE § 1391; CONN. GEN. STAT. ANN. § 31-23; DEL. CODE ANN. tit. 19, § 506; FLA. STAT. ANN. § 450.081; HAW. REV. STAT. § 390-2; 820 ILL. COMP. STAT. ANN. 205/3; IND. CODE ANN. § 20-8.1-4-20 (2003); IOWA CODE ANN. § 92.7; KAN. STAT. ANN. § 38-603; LA. REV. STAT. ANN. § 23-251; ME. REV. STAT. ANN. tit. 26, § 774; MD. CODE ANN., LAB. & EMPL. § 3-210; MICH. COMP. LAWS ANN. § 409.110; MINN. STAT. ANN. § 181A.04; MO. ANN. STAT. § 294.030; MONT. CODE ANN. § 41-2-115; N.H. REV. STAT. ANN. § 276-A:4; N.J. STAT. ANN. § 34:2-21.3; N.M. STAT. ANN. § 50-6-3; N.Y. LAB. LAWS § 142; N.C. GEN. STAT. § 95-25.5; N.D. CENT. CODE § 34-07-15; OHIO REV. CODE ANN. § 4109.07; 40 OKLA. STAT. § 76; OR. REV. STAT. ANN. § 653.315 (2003); PA. STAT. ANN. tit. 43, § 46; S.C. CODE ANN. § 41-13-5; TENN. CODE ANN. § 50-5-104; VT. STAT. ANN. tit. 21, § 434; WASH. REV. CODE § 49.12.121; W. VA. CODE ANN. § 21-6-7; WIS. STAT. ANN. § 103.68 (West 2002).

378. The DOL accepts state-issued work permits and certificates as proof of age. If a state does not issue permits or certificates, the DOL will issue age certificates on request. U.S. GAO, WORK PERMIT AND DEATH AND INJURY REPORTING SYSTEMS IN SELECTED STATES 2 (1992).

379. ALA. CODE § 25-8-47; ALASKA STAT. § 23.10.332(c); ARK. CODE ANN. § 11-6-109(b)(2); CAL. LAB. CODE § 1290; IND. CODE ANN. § 8.1-4-15 (allowing an officer issuing permits to require the presence of the child's parents); IOWA CODE ANN. § 92.11; LA. REV. STAT. ANN. § 23-184; MD. CODE ANN., LAB. & EMPL. § 3-206 (special permits only); N.H. REV. STAT. ANN. § 276-A:5(VIII); N.J. STAT. ANN. § 34:2-21.2; N.M. STAT. ANN. § 50-6-2 (only for extensions); N.Y. LAB. LAWS § 132; N.C. GEN. STAT. § 95-25.5(a)(1) (exceptions only); N.D. CENT. CODE § 34-07-02; PA. STAT. ANN. tit. 43, § 51; R.I. GEN. LAWS § 28-3-23; VA. CODE ANN. § 40.1-92 (Michie 2003); WASH. REV. CODE § 49.12.121(a); W. VA. CODE ANN. § 21-6-3.

380. ALASKA STAT. § 23.10.332(c) (under 17 only); CAL. LAB. CODE § 1285; IND. CODE ANN. § 20-8.1-4-1; LA. REV. STAT. ANN. § 23-184; MD. CODE ANN., LAB. & EMPL. § 3-206 (special permits only); N.H. REV. STAT. ANN. § 276-A:4; N.J. STAT. ANN. § 34:2-21.2; N.Y. LAB. LAWS § 132; N.C. GEN. STAT. § 95-25.5 (exceptions only); PA. STAT. ANN. tit. 43, § 51; WASH. REV. CODE § 49.12.121; W. VA. CODE ANN. § 21-6-3.

allow these teens to work without an employment or age certificate.<sup>381</sup> Thirty-six states permit forty hours or more of work while school is in session.<sup>382</sup> Arkansas, for example, restricts children to fifty-four hours per week during school.<sup>383</sup> Notably, only four states limit the employment of sixteen- and seventeen-year-olds to five hours or less of paid work during a school day.<sup>384</sup> Twenty-eight states impose no restrictions on the amount of work time on school days.<sup>385</sup> Thirty-one states have no upper limit on the amount of hours per day, hours per week, or days per week that minors may work during school vacation.<sup>386</sup>

Administration of state child labor laws is generally poor. A 2002 survey by the Child Labor Coalition found that in the thirty-nine states responding,<sup>387</sup> a total of only 528 inspectors — an average of fourteen per state — were responsible for enforcing all state labor laws, including child labor.<sup>388</sup> Twenty-two jurisdictions have ten or fewer compliance officers.<sup>389</sup> Only three states have twenty-five or more compliance officers;<sup>390</sup> only six have

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381. Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

382. Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

383. ARK. CODE ANN. § 11-6-110.

384. CAL. LAB. CODE § 1391; ME. REV. STAT. ANN. tit. 26, § 774 (West Supp. 2003); N.Y. LAB. LAWS § 143; WASH. REV. CODE § 49.12.121.

385. Alabama, Arizona, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

386. Alabama, Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming.

387. CHILD LABOR COALITION, 2002 CHILD LABOR STATE SURVEY 1 (Oct. 2002), at <http://www.stopchildlabor.org/images/2002survey.pdf> (reporting responses from Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Wisconsin).

388. *Id.* at 2.

389. *Id.* at 3.

390. *Id.* at 2.

inspectors who are exclusively responsible for monitoring child labor laws.<sup>391</sup> Twelve jurisdictions conducted fewer than one hundred inspections of workplaces.<sup>392</sup> Some state agencies have statutes with no penalties for violation or no enforcement authority.<sup>393</sup> The amount collected for state child labor violations was often trivial.<sup>394</sup> In many instances, where an employed minor is fatally injured in the workplace while working illegally, the only penalty is criminal,<sup>395</sup> and in many states even this is not available.<sup>396</sup>

### *b) Workers' Compensation*

When youths are injured on the job, state workers' compensation systems often provide the exclusive remedy.<sup>397</sup> These statutes grant employers immunity from tort actions by injured employees in exchange for limited compensation for injuries that arise out of and in the course of employment.<sup>398</sup> The benefits that injured employees usually receive are typically meager — one-half or two-thirds of employees' average weekly income plus hospital and medical costs.<sup>399</sup> In contrast, the employers' total cost for compensation insurance is a small fraction of their total payroll.<sup>400</sup> Employers are liable for only these small amounts because compensation systems often ignore the problems of long-term disability, occupational disease, and worker rehabilitation.<sup>401</sup> These problems are particularly acute for young workers

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391. *Id.* at 3 (listing Alabama, Florida, Indiana, Missouri, New Mexico, and Texas).

392. *Id.* at 4.

393. *Id.* at 8.

394. For example, in 2002, \$148,000 was collected in California; \$9750 in Minnesota; and \$74,000 in North Carolina. *Id.*

395. *Id.* at 9.

396. *Id.*

397. 1 ARTHUR LARSON & LEX LARSON, WORKERS' COMPENSATION LAW § 66.02 (Matthew Bender 2004) [hereinafter LARSON'S WORKERS' COMP.].

398. Courts must often construe a workers' compensation statute to determine whether an injured minor is a covered "employee" or "worker." *See, e.g., Allis v. Employer's Temp. Serv., Inc.*, 277 N.W.2d 340 (Mich. Ct. App. 1979) (stating that a minor employed in violation of labor statute may not bring negligence action against employer); *Danek v. Meldrom Mfg. & Eng'g Co.*, 252 N.W.2d 255 (Minn. 1977) (same). Other courts have barred common law actions against employers where there was a statutory presumption that a minor was to receive benefits under the statute unless a parent or guardian gave notice to the contrary before the accident. *See, e.g., Evans v. Allentown Portland Cement Co.*, 252 A.2d 646 (Pa. 1969) (barring negligence action by minor against employer because minor did not opt out of statutory provisions).

399. 1 LARSON'S WORKERS' COMP., *supra* note 397, § 1.03[5].

400. DANIEL M. BURMAN, DEATH ON THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES 4-5 (1978) (estimating 1%).

401. *Id.*

injured on the job. In addition, workers' compensation awards may be less for young workers because they are more likely to work part-time, earn lower wages, lack dependents, and be illegally employed.<sup>402</sup>

Workers' compensation awards are generally based on a percentage of employees' average weekly wages, termed the "wage basis."<sup>403</sup> Minors' current earnings are likely to be for part-time work and at a low wage rate; thus, youth workers tend to receive small awards.<sup>404</sup> Workers' compensation awards are often increased if the employee has dependents, an unlikely scenario for minors.

Other worker compensation factors disadvantage subgroups of child workers. Many youth laborers are classified as illegally employed because of the hours or types of work they perform. While many workers' compensation statutes cover both legally and illegally employed minors,<sup>405</sup> some states make eligible only those youths lawfully employed.<sup>406</sup> Although children working in agriculture are exposed to many hazards, they often do not receive worker compensation protection because the classification of migrant workers as "independent contractors" means children often are not considered "employees."<sup>407</sup>

### c) Compulsory School Attendance Laws

States have *parens patriae* power to limit parental freedom — and the child's decision making — when those choices might endanger the welfare of

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402. 3 LARSON'S WORKERS' COMP., *supra* note 397, § 66.02.

403. 5 *id.* § 93.01[1][a]. The most common approach to determining the wage basis consists of three factors. First, if claimants have substantially worked in this type of employment for the entire preceding year, their wage basis is simply the average wage for that year. *Id.* Second, if the employee did not work substantially in that job for the preceding year, then the wage is that of the same "class" of worker in the same or a nearby location. *Id.* If neither of these two methods can fairly be applied, then the weekly wage is set at a level that "shall reasonably represent the annual earning capacity of the injured employee." *Id.* This third catch-all provision is employed only if neither of the first two methods can be fairly or reasonably applied. *Id.* § 93.01[1][e].

404. See *id.* § 93.02[2][d]. For example, in *Mabry v. Bowers' Implement Co.*, 269 S.E.2d 165 (N.C. Ct. App. 1980), a high school student was killed on the job. To determine his wage basis, the court averaged Mabry's forty-one weeks of part-time employment and eleven weeks of full-time employment. *Id.* at 168.

405. 3 LARSON'S WORKERS' COMP., *supra* note 397, § 66.02[1].

406. *Id.* (see, for example, Wyoming, Oklahoma, and Vermont); see also Nina Krauth, Comment, *Do Farmers Reap More Than Their Child Laborers Sow? The Conflict Between the Fair Labor Standards Act and State Workers' Compensation Laws*, 5 SAN JOAQUIN AGRIC. L. REV. 213, 221 (1995).

407. Krauth, *supra* note 406, at 222.

children.<sup>408</sup> For example, all states now have some compulsory school attendance laws. However, these are far too lenient to ensure appropriate decision making regarding work and education.

Massachusetts passed the first compulsory school attendance law in 1852.<sup>409</sup> The movement for mandatory education provided a powerful rationale to restrict child labor. Until the turn of the century, however, states generally did not enforce compulsory attendance laws and child labor restrictions.<sup>410</sup> Between 1890 and the 1930s, however, American education systems grew, new techniques of bureaucratic control emerged, and legislatures passed stronger laws, giving school officials sophisticated new techniques to bring truants into schools. By the time of the Great Depression, most states were requiring youth to attend some high school, and current mandatory education laws were in place.<sup>411</sup>

When examined in detail, particularly in light of the weaknesses of the child labor laws, contemporary school compulsory attendance laws impose few important restrictions on the decision to work. These statutes allow early withdrawal from school and often give parents little legal leverage over the decision to drop out. Fewer than one-third of states require attendance until the age of eighteen.<sup>412</sup> Seven of these — Connecticut, Indiana, Louisiana, New Mexico, Oklahoma, Virginia, and Washington — except students who obtain parental consent to withdraw from education.<sup>413</sup> Only six states require school attendance until the age of seventeen.<sup>414</sup> In twenty-seven states, students may leave school at sixteen.<sup>415</sup> Astonishingly, in twenty-two of these

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408. See *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-1202 (1980).

409. URBAN & WAGONER, *supra* note 81, at 173.

410. See, e.g., FELT, *supra* note 75, at 7; see also FOREST C. ENSIGN, *COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR* 119-21 (Arno Press & The New York Times 1969) (1921).

411. David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Education*, 46 HARV. ED. REV. 355, 359 (1976).

412. See *infra* App. A.

413. CONN. GEN. STAT. ANN. § 10-184 (West 2002); IND. CODE ANN. § 20-8.1-1-3-17 (Michie 1997 & Supp. 2004); LA. REV. STAT. ANN. § 17:221 (West 2001 & Supp. 2004); N.M. STAT. ANN. § 22-12-2 (Michie 2003); 70 OKLA. STAT. § 10-105 (2001 & Supp. 2003); VA. CODE ANN. § 22.1-254 (Michie 2003); WASH. REV. CODE § 28A.225.010 (1997 & Supp. 2003).

414. See *infra* App. A.

415. ALA. CODE § 16-28-3 (2003); ALASKA STAT. § 14.30.010 (Michie 2002); ARIZ. REV. STAT. ANN. § 15-802 (West 2002); COLO. REV. STAT. § 22-33-104 (2004); DEL. CODE ANN. tit. 14, § 2702 (2003); FLA. STAT. ANN. § 232.01 (West 1998); GA. CODE ANN. § 20-2-690.1 (Harrison 1987); IDAHO CODE § 33-202 (Michie 2001); IOWA CODE ANN. § 299.1A (West 1996); KY. REV. STAT. ANN. § 159.010 (Banks-Baldwin 1999); MD. CODE ANN., EDUC. § 7-301 (2004); MASS. GEN. LAWS ANN. ch. 76, § 1 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. §

states, no parental consent is required.<sup>416</sup> Only Arizona, Kentucky, Minnesota, New Hampshire, and Rhode Island require parental consent for a sixteen-year-old child's withdrawal from school.<sup>417</sup> Thus, work and schooling truly are outlier instances of juvenile autonomy.

### *B. Prescriptions for Improvement*

The Child Labor Coalition (CLC), an advocacy organization, drafted a Model State Child Labor Law, which addresses many of the shortcomings of current federal and state law.<sup>418</sup> The model statute equalizes legal protection of children in agriculture with those in other industries<sup>419</sup> and sets the minimum work age at fourteen.<sup>420</sup> The CLC proposal recognizes the important link between education and employment; high-intensity work is discouraged by limiting the maximum number of hours an adolescent can work based on age and school term.<sup>421</sup> Fourteen- to fifteen-year-olds are restricted to a maximum fifteen hours of work when school is in session and thirty hours when school is not in session,<sup>422</sup> sixteen- to seventeen-year-olds may work no

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380.1561 (West 1997); MINN. STAT. ANN. § 120A.22 (West 2000); MO. ANN. STAT. § 167.031 (West 2000); MONT. CODE ANN. § 20-5-103 (1999); NEB. REV. STAT. § 79-201 (2003); N.H. REV. STAT. ANN. § 193.1 (2001); N.J. STAT. ANN. § 18A:38-25 (West 1999); N.Y. EDUC. LAW § 3205 (McKinney 2001); N.C. GEN. STAT. § 155C-378 (2002); N.D. CENT. CODE § 15.1-20-01 (2003); R.I. GEN. LAWS § 16-19-1 (1996); S.D. CODIFIED LAWS § 13-27-1 (Michie 2002); VT. STAT. ANN. tit. 16, § 1121 (1989); W. VA. CODE ANN. § 18-8-1 (Michie 2003); WYO. STAT. ANN. § 21-4-102 (Michie 2003).

416. ALA. CODE § 16-28-3; ALASKA STAT. § 14.30.010; COLO. REV. STAT. § 22-33-104; DEL. CODE ANN. tit. 14, § 2702; FLA. STAT. ANN. § 232.01; GA. CODE ANN. § 20-2-690.1; IDAHO CODE § 33-202; IOWA CODE ANN. § 299.1A; MD. CODE ANN., EDUC. § 7-301; MASS. GEN. LAWS ANN. ch. 76, § 1; MICH. COMP. LAWS ANN. § 380.1561; MO. ANN. STAT. § 167.031; MONT. CODE ANN. § 20-5-103; NEB. REV. STAT. § 79-201; N.J. STAT. ANN. § 18A:38-25; N.Y. EDUC. LAW § 3205; N.C. GEN. STAT. § 155C-378; N.D. CENT. CODE § 15.1-20-01; S.D. CODIFIED LAWS § 13-27-1; VT. STAT. ANN. tit. 16, § 1211; W. VA. CODE § 18-8-1; WYO. STAT. ANN. § 21-4-102.

417. ARIZ. REV. STAT. ANN. § 15-802; KY. REV. STAT. ANN. § 159.010; MINN. STAT. ANN. § 120A.22; N.H. REV. STAT. ANN. § 193:1; R.I. GEN. LAWS § 16-19-1.

418. CHILD LABOR COALITION, MODEL STATE CHILD LABOR LAW (1992) [hereinafter CLC MODEL LAW].

419. *Id.* The current FLSA draws a distinction between agricultural and nonagricultural labor and exempts children working alongside their parents in agriculture from child labor work restrictions. Nearly one-half of states have no minimum age for agricultural employment. CHILD LABOR COALITION, EXECUTIVE SUMMARY OF THE MODEL STATE CHILD LABOR LAW, at <http://www.stopchildlabor.org/USchildlabor/modelstatelaw.htm> (last visited Aug. 17, 2004) [hereinafter CLC EXEC. SUMMARY].

420. CLC MODEL LAW, *supra* note 418, § 3.

421. *Id.* §§ 5-7.

422. *Id.* § 6.

more than twenty hours per week when school is in session and forty hours when school is not in session.<sup>423</sup> The model legislation also requires a work permit for all employed minors,<sup>424</sup> which needs parental consent as well as the signature of a school official.<sup>425</sup> The permit may be revoked upon the recommendation of a parent, teacher, or guidance counselor if there is evidence of poor academic performance.<sup>426</sup>

Other important improvements would result from adoption of the CLC model statute. The model statute would update the DOL's "hazardous occupations" to reflect current workplace realities.<sup>427</sup> Enhanced enforcement provisions include publicizing repeat and intentional child labor law violators and distributing the list to students, parents, employers, and educators.<sup>428</sup> Moreover, the model statute would deposit fines imposed on violators in a fund to be used exclusively to further the purposes of child labor laws.<sup>429</sup> In addition, the model statute would bar repeat violators from government grants, contracts, and loans for five years and prohibit violators from employing minors for five years.<sup>430</sup>

There are numerous federal proposals to improve the existing legislation regulating child labor. Two bills seeking to amend the FLSA were introduced in Congress in the last three years.<sup>431</sup> While there is little hope for enactment of these measures in the present political environment, the statutory changes would significantly improve the present legal structure.

Senator Harkin's 2001 bill, "Children's Act for Responsible Employment" (CARE),<sup>432</sup> died without action. CARE would have deleted two current agriculture provisions<sup>433</sup> and increased civil and criminal penalties. The

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423. *Id.*

424. *Id.* § 9.

425. *Id.* Adolescents must also participate in labor education before entering the workforce. CLC EXEC. SUMMARY, *supra* note 419. At a minimum, a minor must read a booklet and pass a test to receive a work permit. *Id.*

426. Many states now require some adult approval for child labor, but most only require permits for minors under sixteen and do not use the permits as an enforcement or educational tool. CLC EXEC. SUMMARY, *supra* note 419.

427. CLC MODEL LAW, *supra* note 418, § 8.

428. Currently only seven states publicize violators. CLC MODEL LAW, *supra* note 418, § 11(D); CLC EXEC. SUMMARY, *supra* note 419.

429. CLC MODEL LAW, *supra* note 418, § 13(F).

430. *Id.* § 13(D).

431. Youth Worker Protection Act, H.R. 3139, 108th Cong. (2003); Children's Act for Responsible Employment of 2001, S. 869, 107th Cong.

432. S. 869, 107th Cong.

433. *Id.* § 2 (deleting 29 U.S.C. § 213(c)(2), allowing children under sixteen to work in occupations if employed by a parent, and 29 U.S.C. § 213(c)(4), allowing employers to petition for waiver to hire children under twelve to engage in hand harvest of crops for no more than

Harkin bill would have permitted plaintiffs to recover reasonable attorney fees from defendants in child labor violation suits.<sup>434</sup> CARE was referred to the Senate Committee on Health, Education, Labor, and Pensions on May 10, 2001 but was never considered.<sup>435</sup>

In 2003, Representative Tom Lantos introduced the "Youth Worker Protection Act."<sup>436</sup> The Lantos legislation would have several positive effects on the current child labor situation in the United States. It would require work permits for minors<sup>437</sup> and amend the FLSA to increase protection of migrant agriculture labor.<sup>438</sup> Information gathering would be improved by requiring the federal government to compile data on both the types of occupations in which minors work and violations of child labor provisions.<sup>439</sup> Employers would be required to report any serious work-related injury to the DOL.<sup>440</sup> The Act would require the DOL to compile statistics on work permits and work-related injuries and report these annually to Congress.<sup>441</sup> This legislation would also limit minors' hours of work when school is in session.<sup>442</sup> The Youth Worker Protection Act includes criminal penalties for employers who willfully violate child labor provisions, causing serious bodily injury or death to a minor employee.<sup>443</sup> To improve enforcement, the Act

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eight weeks).

434. *Id.* § 4. Under CARE, employers would have to report job injuries or illnesses involving minors. *Id.* Finally, CARE contained a provision encouraging increased coordination between local and national governmental agencies. *Id.* § 5.

435. Bill Summary & Status for the 107th Congress, at <http://thomas.loc.gov> (last visited Nov. 30, 2004).

436. H.R. 3139, 108th Cong. (2003).

437. *Id.* § 203. The work permit application would require proof of age, parental consent, a statement that the minor is enrolled in school full-time, verification of school attendance, a description of the type of work to be performed, a summary of legal protections, and contact information for the relevant state agency. *Id.* The last two provisions would educate youth workers who are often unsophisticated about their legal rights.

438. *Id.* § 102.

439. *Id.* § 206.

440. *Id.* § 205.

441. *Id.*

442. Fourteen- to fifteen-year-olds would be permitted a maximum of three hours per day and fifteen hours per week; sixteen- to eighteen-year-olds would be permitted four hours per day and twenty hours per week. *Id.* § 204. The FLSA currently imposes no time restrictions on those over sixteen. In addition, fourteen- to fifteen-year-olds would be allowed to work only between 7:00 a.m. and 7:00 p.m. and sixteen- to eighteen-year-olds only between 7:00 a.m. and 11:00 p.m. *Id.* New restrictions on permissible workplaces would also be imposed; for example, youths under eighteen would be barred from paper baling, peddling, and seafood processing. *Id.* §§ 105-106, 203. "Peddling" includes the sale of goods or services in a public place, door-to-door, or from a vehicle (except newspaper delivery). *Id.* § 106(b).

443. *Id.* § 208(d). The maximum sentence for a first offense would be three years and five



would create a private cause of action and award attorney fees to plaintiffs who prevail in child labor violation claims.<sup>444</sup> The Federal Register and the DOL website would also publish the names of willful violators of the child labor provisions.<sup>445</sup>

### *VI. Conclusion*

In the end, this Article returns to the very beginning. As President Franklin Roosevelt noted in 1937, there is “no justification” for the amount and results of child labor in the United States. Although some of the original abuses have been eliminated since 1937, others remain and new problems have emerged in the modern era. In some situations, minors and their families may legitimately make the choice to work. Young people may benefit from opportunities to acquire responsibility, compensation, and knowledge in the workplace. But these opportunities should create “social capital” — opportunities for later employment or education. The current legal rules, and administration of these rules, create enormous damage to American children, their families, and society at large. The subject of child labor elicits instinctive images of a problem long since solved in the United States and confined to the developing world. Yet it is these instinctive images and lack of political will that hamper reexamination of our current public policies. It is time to begin a public conversation about this unspoken tragedy.

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years for a second offense. *Id.*

444. *Id.* § 208(a).

445. *Id.* § 208(b).

APPENDIX A  
Compulsory School Attendance Summary

1. Alabama
  - a. Attendance is mandatory until the age of sixteen. ALA. CODE § 16-28-3 (1975).
2. Alaska
  - a. Attendance is mandatory until the age of sixteen. ALASKA STAT. § 14.30.010 (Michie 2002).
3. Arizona
  - a. Attendance is mandatory until the age of sixteen. ARIZ. REV. STAT. ANN. § 15-802 (West 2002).
  - b. Noted exceptions:
    - i. Over fourteen and employed at some lawful wage-earning occupation with parents' consent.
    - ii. Child presents reasons for nonattendance, and school board consents to child's reasons.
  - c. Enforcement
    - i. Parent who does not ensure that child attends school is guilty of class 3 misdemeanor.
4. Arkansas
  - a. Attendance is mandatory until the age of seventeen. ARK. CODE ANN. § 6-18-201 (Michie 1987).
  - b. Noted exception:
    - i. Child age sixteen or seventeen enrolled in approved adult education program is exempt from attendance policy.
5. California
  - a. Attendance is mandatory until the age of eighteen. CAL. EDUC. CODE § 48200 (West 1993).
6. Colorado
  - a. Attendance is mandatory until the age of sixteen. COLO. REV. STAT. § 22-33-104 (2004).
  - b. Noted exception:
    - i. Issued a work permit pursuant to Colorado law.
7. Connecticut
  - a. Attendance is mandatory until the age of eighteen. CONN. GEN. STAT. ANN. § 10-184 (West 2002).
  - b. Noted exception:
    - i. Parents can consent to withdrawal of children aged sixteen and seventeen.

8. Delaware

- a. Attendance is mandatory until the age of sixteen. DEL. CODE ANN. tit. 14, § 2702 (2003).

9. Florida

- a. Attendance is mandatory until the age of sixteen. FLA. STAT. ANN. § 232.01 (West 1998).  
b. Note: School must notify parent of student's withdrawal after age sixteen, but consent is not necessary.

10. Georgia

- a. Attendance is mandatory until the age of sixteen. GA. CODE ANN. § 32-2104.1 (Harrison 1987).

11. Hawaii

- a. Attendance is mandatory until the age of eighteen. HAW. REV. STAT. ANN. § 302A-1132 (1993).  
b. Noted exceptions:  
i. Child is fifteen and suitably employed and has been excused from attendance by superintendent or by family court judge.  
ii. Upon consent by school and parents, child will receive alternative education.

12. Idaho

- a. Attendance is mandatory until the age of sixteen. IDAHO CODE § 33-202 (Michie 2001).  
b. Noted exception:  
i. Unless otherwise comparably taught, attendance is mandatory until sixteen.

13. Illinois

- a. Attendance is mandatory until the age of eighteen. 105 ILL. COMP. STAT. ANN. 5/13-3 (West 1998).  
b. Noted exception:  
i. Child between ages sixteen-eighteen who is employed in some occupation or service shall attend school part time.

14. Indiana

- a. Attendance is mandatory until the age of eighteen. IND. CODE ANN. § 20-8.1-3-17 (Michie 1997).  
b. Noted exception:  
i. Parent and guardian agree to student age sixteen-eighteen withdrawal. Student must consent to an exit interview where he signs withdrawal consent slip, along with parents.

15. Iowa

- a. Attendance is mandatory until the age of sixteen. IOWA CODE ANN. § 299.1A (West 1996).

**16. Kansas**

- a. Attendance is mandatory until the age of eighteen. KAN. STAT. ANN. § 72-1111 (2002).
- b. Noted exceptions: Child between sixteen-eighteen will be exempt if:
  - i. Child enrolled in alternative education.
  - ii. Child and parent attend final counseling interview, which is to encourage child to stay in school. Information is given to child regarding future earning potential of those who leave high school versus those who finish high school.

**17. Kentucky**

- a. Attendance is mandatory until the age of sixteen. KY. REV. STAT. ANN. § 159.010 (Banks-Baldwin 1999).
- b. Noted exception:
  - i. Child between sixteen-eighteen who wishes to leave school must have written consent from parent and attend an exit interview with school officials.

**18. Louisiana**

- a. Attendance is mandatory until the age of seventeen. LA. REV. STAT. ANN. § 17:221 (West 2001).
- b. Noted exception:
  - i. A student between the ages of sixteen and seventeen may withdraw from school with parent written consent.

**19. Maine**

- a. Attendance is mandatory until the age of seventeen. ME. REV. STAT. ANN. tit. 20A § 5001-A (West 1993).
- b. Noted exceptions: Child who reaches age fifteen or completed ninth grade, and:
  - i. Consent from parent to withdraw, and;
  - ii. Consent of principal to withdraw, and;
  - iii. Consent from school board to withdraw, and;
  - iv. Agree to meet with school board annually until child reaches age seventeen to discuss educational needs.

**20. Maryland**

- a. Attendance is mandatory until the age of sixteen. MD. CODE ANN. EDUC. § 7-301 (2004).

**21. Massachusetts**

- a. Attendance is mandatory until the age of sixteen. MASS. GEN. LAWS ANN. ch. 76, § 1 (Law. Co-op. 1991).

**22. Michigan**

- a. Attendance is mandatory until the age of sixteen. MICH. COMP. LAWS ANN. § 380.1561 (West 1997).

## 23. Minnesota

a. Attendance is mandatory until the age of sixteen. MINN. STAT. ANN. § 120A.22 (West 2000).

b. Noted exception:

i. Students age sixteen-eighteen who wish to withdraw must obtain parents' consent and attend meeting with school authorities to discuss educational opportunities available to student.

## 24. Mississippi

a. Attendance is mandatory until the age of seventeen. MISS. CODE ANN. § 37-13-91 (1999).

## 25. Missouri

a. Attendance is mandatory until the age of sixteen. MO. ANN. STAT. § 167.031 (West 2000).

b. Noted exception:

i. If gainfully employed with consent of superintendent, student may be excused from compulsory attendance.

## 26. Montana

a. Attendance is mandatory until the age of sixteen. MONT. CODE ANN. § 20-5-103 (1999).

## 27. Nebraska

a. Attendance is mandatory until the age of sixteen. NEB. REV. STAT. § 79-201 (2003).

b. Noted exception:

i. Student may be excused if necessary to work to support family. *Id.* § 79-202.

## 28. Nevada

a. Attendance is mandatory until the age of seventeen. NEV. REV. STAT. 392.040 (2003).

b. Noted exceptions:

i. Student over fourteen and must support family. *Id.* 392.100.

ii. Student over fourteen and engaged in full-time employment. *Id.* 392.110.

## 29. New Hampshire

a. Attendance is mandatory until the age of sixteen. N.H. REV. STAT. ANN. § 193:1(1) (2001).

b. Noted exception:

i. A child who wishes to terminate enrollment in school must have written consent of parent and a conference with the principal. *Id.* § 193:1(10).

## 30. New Jersey

- a. Attendance is mandatory until the age of sixteen. N.J. STAT. ANN. § 18A: 38-25 (West 1999).

## 31. New Mexico

- a. Attendance is mandatory until the age of eighteen. N.M. STAT. ANN. § 22-12-2 (Lexis 2003).
- b. Noted exceptions: Students between ages seventeen-eighteen may be excused by school board if:
  - i. shown to have gainful employment and parental consent
  - ii. enrolled in alternative education
  - iii. parental consent and superintendent consent.

## 32. New York

- a. Attendance is mandatory until the age of sixteen. N.Y. EDUC. LAW § 3205 (McKinney 2001).
- b. Noted exceptions:
  - i. If working full time, student will have to attend school part time.
  - ii. In each city and union-free school districts having a population of more than 4500 people, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend school full time.

## 33. North Carolina

- a. Attendance is mandatory until the age of sixteen. N.C. GEN STAT. § 15C-378 (2002).

## 34. North Dakota

- a. Attendance is mandatory until the age of sixteen. N.D. CENT. CODE § 15.1-20-01 (2003).
- b. Noted exception:
  - i. Child is necessary to the support of the child's family. *Id.* § 15.1-20-02.

## 35. Ohio

- a. Attendance is mandatory until the age of eighteen. OHIO REV. CODE ANN. § 3321.01 (Anderson 2002).

## 36. Oklahoma

- a. Attendance is mandatory until the age of eighteen. 70 OKLA. STAT. § 10-105 (2001).
- b. Noted exception:
  - i. A child between the ages of sixteen-eighteen is excused from attending school by written agreement between school administrator and parent.

## 37. Oregon

- a. Attendance is mandatory until the age of eighteen. OR. REV. STAT. § 339.010 (2003).

## 38. Pennsylvania

- a. Attendance is mandatory until the age of eighteen. PA. STAT. ANN. tit. 24, § 13-1332 (West 1992).

## 39. Rhode Island

- a. Attendance is mandatory until the age of sixteen. R.I. GEN. LAWS § 16-19-1 (1996).
- b. Noted exception:
  - i. Children ages sixteen-eighteen shall attend school regularly unless they have written permission from parent to withdraw from school.

## 40. South Carolina

- a. Attendance is mandatory until the age of seventeen. S.C. CODE ANN. § 59-65-10 (Law. Co-op. 2004).

## 41. South Dakota

- a. Attendance is mandatory until the age of sixteen. S.D. CODIFIED LAWS § 13-27-1 (Michie 2002).

## 42. Tennessee

- a. Attendance is mandatory until the age of seventeen. TENN. CODE ANN. § 49-6-3005 (2002).

## 43. Texas

- a. Attendance is mandatory until the age of seventeen. TEX. EDUC. CODE ANN. § 25.085 (Vernon 1996).

## 44. Utah

- a. Attendance is mandatory until the age of eighteen. UTAH CODE ANN. § 53A-11-101 (2000).
- b. Noted exceptions:
  - i. over sixteen and gainfully employed
  - ii. school board determines that child is unable to profit from education because of poor attitude. *Id.* § 53A-11-102.

## 45. Vermont

- a. Attendance is mandatory until the age of sixteen. VT. STAT. ANN. tit. 16, § 1121 (1989).

## 46. Virginia

- a. Attendance is mandatory until the age of eighteen. VA. CODE ANN. § 22.1-254 (Michie 2003).
- b. Noted exception:
  - i. School board may excuse student age sixteen-eighteen who has written consent of parent to withdraw from school.

## 47. Washington

- a. Attendance is mandatory until the age of eighteen. WASH. REV. CODE § 28A.225.010 (1997).
- b. Noted exception:
  - i. Children over the age of sixteen may be exempt if gainfully employed, and parent consents to withdraw.

## 48. West Virginia

- a. Attendance is mandatory until the age of sixteen. W. VA. CODE ANN. § 18-8-1 (Michie 2003).
- b. Noted exception:
  - i. Child shall be exempt from attendance if granted a work permit, but must have completed at least eighth grade.

## 49. Wisconsin

- a. Attendance is mandatory until the age of eighteen. WIS. STAT. ANN. § 118.15 (West 2004).
- b. Noted exception:
  - i. Any child who is sixteen-seventeen and obtains parent's consent may withdraw if child and parent agree that child will participate in program or curriculum modification that will lead to graduation.

## 50. Wyoming

- a. Attendance is mandatory until the age of sixteen. WYO. STAT. ANN. § 21-4-102 (Michie 2003).



